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THESIS

**WAR POWERS: REFORMING THE LAW, WITH CASE STUDIES OF
U.S. MILITARY PARTICIPATION IN THE PERSIAN GULF AND HAITI**

by

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March 2000

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PARTICIPATION IN THE PERSIAN GULF AND HAITI**

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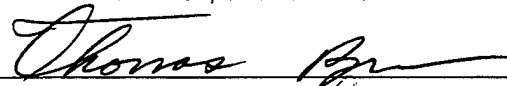
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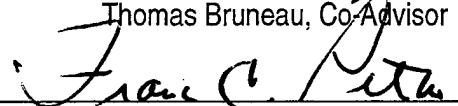


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The thesis studies the U.S. legal framework on war powers, concluding that it has not allowed the President and Congress to work together on war powers issues. From the constitutional viewpoint, this lack of friendly environment arises from the fact that the Constitution shares war powers between the presidency and the Congress, producing the conflict. From a political viewpoint, this dispute is explained by the presidential willingness to use the war powers without congressional authorization. In addition, every time lawmakers have sued the president for violations of the War Powers Resolution, the judiciary has ruled that this is a political question, therefore, not justiciable. Legally speaking, this conflict could end in a constitutional conflict. Politically speaking, this dispute could also have an important impact on the role that the United States plays within the community of nations and on the US national security goal of promoting democracy abroad. In order to offer a possible solution, the thesis proposes legal changes that would strengthen the consultation process established by both the War Powers Resolution and the National Security Act of 1947.

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I. INTRODUCTION

The purpose of the thesis is to study the U.S. legal framework on war powers, seeking to conclude to what extent this framework allows the President and Congress to work together in those situations in which the government must decide whether to deploy U.S. troops abroad. In addition, if the conclusion of this study is that this legal framework does not assure this type of friendly and efficient relationship, the goal is to propose a possible solution to the problem.

To accomplish this twofold goal, the thesis begins with the hypothesis that the legal framework has not effectively provided this kind of environment. In fact, although the Constitution—following the principles of separation of powers—formally distributed war powers among the branches of government, it caused a never-ending struggle between the President and Congress. Further, congressional efforts to define by means of statutory law what the boundaries are between the President and Congress on war powers have not succeeded. In fact, the War Powers Resolution, enacted by Congress in 1973 as a means to clarify these boundaries, proved to be an element that, conversely, aggravated the struggle.

What seem to be the causes of this unresolved issue? Broadly speaking, these causes can be divided into constitutional and political. From the constitutional viewpoint this struggle mainly arises from the fact that, even though the Constitution allocates war powers to both the executive and legislative branches, what it really does is to share powers between the President and Congress. Consequently, it is in the process of sharing powers that these two branches of government disagree, producing the conflict. Yet this dispute could also be explained by a political factor: the presidential unwillingness to send military forces abroad without asking for authorization from Congress. The War Powers Resolution mandates that the President request such

permission, yet no President has ever completely invoked it. Basically, the President's argument for acting in this way has been the unconstitutionality of the War Powers Resolution and the freedom of action presidents need to have as commanders-in-chief to make decisions without any opposition from the other branches of government.

With regard to this political factor, however, the thesis points out that it seems that the dispute between the President and Congress is to some extent only nominal. This appears to be so because the legislative branch is not willing to challenge presidential decisions regarding war powers. In fact, since the War Powers Resolution was enacted in 1973, neither the Senate nor the House of Representatives has ever taken any measure to clarify either by judicial or legislative means the distribution of powers set forth in the Constitution. In addition, every time lawmakers as individuals have sued the President for violation of the War Powers Resolution, the judiciary has ruled that this is a political question and, therefore, not a matter that falls under the jurisdiction of the court.

Despite the fact that so far the current situation has not escalated into a major crisis, the thesis points out that this might no longer be the case in the future. The argument supporting this assessment comes from the fact that there are new elements in the international environment that might increase the dispute between the President and Congress, thus making it impossible for the two branches to achieve a solution. Legally speaking, this probable outcome could end in a constitutional conflict, with no third party (the judiciary) willing to rule which branch of government is right on this issue. Politically speaking, this dispute could also have an important impact on the role that the United States plays within the community of nations and on the U.S. national security goal of promoting democratic principles abroad, which demand that its leaders find a solution before the struggle damages its credibility.

What type of solution can be proposed in this regard? In broad sense, there are two probable avenues: to insist on the political approach, which up to now has been the way the executive and legislative branches have chosen to manage each crisis; or to reform the law, seeking to make the process more realistic and efficient. The thesis takes the option of the legal solution, mainly because the political case-by-case scenario has proven to be confrontational, placing the President and Congress on opposite sides, with inconvenient consequences for the U.S. domestic politics and foreign relations. Further, from a legal viewpoint it seems that every time the President and Congress have achieved political agreements in this respect they have done so by violating the legal framework set forth regarding war powers (i.e., the Constitution and the War Powers Resolution). For that reason, the solution proposed in the thesis considers legal changes that would strengthen the consultation process established by both the War Powers Resolution and the National Security Act of 1947.

To accomplish the goal of the thesis, the argument is divided into five chapters. The second chapter explains the origins of the constitutional principles and the reason why these were included in the U.S. Constitution. This explanation is necessary to the thesis because any solution to this presidential-congressional dispute must be based upon respect for the principles set forth in the Constitution. The third chapter describes, explains and analyses the legal framework that governs the participation of the branches of government in the decision-making process regarding the use of military force. The fourth chapter analyzes why this legal framework has not succeed since it was enacted, focussing its attention on the relations between the President and Congress and on the role played by the judiciary in this conflict. The fifth chapter addresses two case studies—the Persian Gulf War and the U.S. military intervention in Haiti—in which the thesis seeks to find what kind of issues were of concern to the executive and the legislature that might helped to

increase the dispute. According to the findings of these four chapters, the sixth chapter makes policy recommendations regarding the legal and political relationship between the President and Congress.

Finally, the author would like to emphasize the fact that, even though the thesis takes the option of proposing a legal solution to this dispute, it does not mean to forget the political aspect of it. In this matter, the author is well aware of the fact that besides the legal aspect of the dispute between the President and Congress on war powers there is also a political dimension. Further, it is acknowledged that most of the time this political dimension allows the executive and legislative branches of the federal government to build specific communication linkages, facilitating the solution of any particular situation that could keep the President and Congress in conflict. This thesis, however, goes beyond the political aspect of the dispute. In this vein, what is intended is to demonstrate that the legal framework set forth on war powers does not match what is politically necessary to make the decision-making process workable and efficient. If this is the case, from a legal viewpoint what should be done is to reform the law. Thus, the final purpose of the thesis is to propose such reforms, taking into consideration that they must not oppose the constitutional principles of separation of powers, checks and balances, and federalism.

II. CONSTITUTIONAL BASIS OF WAR POWERS

A. THE CONSTITUTIONAL PRINCIPLES

Departing from the British model, and thus disregarding both the federative powers and the executive prerogative doctrines that were part of the British political system, the founding fathers drafted the U.S. Constitution based upon the theory of separation of powers and the system of checks and balances.¹ Following John Locke's thoughts, federative powers meant the fusion of executive and legislative power in conducting foreign affairs. Executive prerogative doctrine implied "the power to determine the public good or interest in circumstances that were unforeseen or unforeseeable by the legislative...[which would allow the executive]...to act contrary to standing law as well as the power to act in the face of the standing law's silence in order to preserve the nation from external military threat or internal violence."²

The reason why the framers of the Constitution rejected these two constitutional features from the beginning had to do with the profound belief that, unlike the British system, the federal system to be built under the Constitution must not incorporate an executive carrying "Roman dictatorial powers,"³ but rather be a federal government of three integrated branches, each of which would have distinct powers for carrying out its constitutional duties. According to James Madison, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether

¹ Richard Morris, "The Origin and Framing of the Constitution," in *The United States Military under the Constitution of the United States*, ed. Richard H. Kohn, 41-60 (New York, NY: New York University Press, 1991), 42.

² Edward Keynes, *Undeclared War: Twilight Zone of Constitutional Power*, 1st paperback ed. (Pennsylvania, PA: The Pennsylvania State University, 1991), 11-12.

³ David F. Epstein, "The Political Theory of the Constitution," in *Confronting the Constitution*, ed. Allan Bloom, 77-141 (Washington, D.C.: American Enterprise Institute, 1990), 92.

of one, a few, or many...may justly be pronounced the very definition of tyranny."⁴ This is why the framers took from the British model just the theory of separation of powers—as necessary restraint on both executive and congressional arbitrariness—and the checks and balance doctrine, which would permit a reasonable oversight by one branch of government over the others.

By the theory of separation of powers the framers of the Constitution intended to provide the three branches of national government with the necessary independence to take proper care of the matters of which they were supposed to be in charge.⁵ In addition, the framers were concerned about the dangers to the liberty of the people that might result if all the powers were granted to a single branch. In this vein Gerhard Casper affirms:

Invocation of the term “separation of powers” in bills of rights, such as those of Maryland, Massachusetts, New Hampshire, North Carolina, Virginia, and France,...suggests a common linkage between the concept of liberty and the notion of separation of powers. Although the meaning of liberty was not something on which agreement existed, the functional linkage was emphasized again and again.⁶

Complementing the theory of separation of powers, the framers included in the Constitution the system of checks and balances. The framers understood that power in one hand without any control meant abuse and tyranny. However, according to Louis Fisher, “without the power to withstand encroachments by another branch, a department might find its powers drained to the point of extinction.”⁷ The framers were aware of this hazard and, therefore, implicitly allowed

⁴ James Madison, “The Federalist No. 47,” in *The Federalist Papers* (New York, NY: The New American Library, 1961), 301.

⁵ Edward S. Corwin and Jack W. Peltason, *Understanding the Constitution*, 3d ed. (New York, NY: Holt, Rinehart and Winston, 1964), 27.

⁶ Gerhard Casper, *Separating Powers: Essays on the Founding Period* (Cambridge, MA: Harvard University Press, 1997), 8.

⁷ Louis Fisher, *Constitutional Conflicts between Congress and the President* (Princeton, NJ: Princeton University Press, 1985), 14.

the system of checks and balances in the Constitution as a complementary and blending element of the separation of powers.⁸ In this regard, James Madison linked the principle of separation of powers to the idea of checking and balancing the powers, relying on Montesquieu's thoughts. Madison argues that by separation of powers Montesquieu "...did not mean that [the executive, legislative, and judiciary] departments ought to have no *partial agency* in, or no *control* over, the acts of each other."⁹ Conversely, Montesquieu interpreted the British Constitution as giving each branch a necessary and expected control over the acts of the others. Following this path, Madison asserted:

The magistrate in whom the whole executive power resides cannot of himself make a law, though he can put a negative on every law; nor administer justice in person, though he has the appointment of those who administer it. The judges can exercise no executive prerogative, though they are shoots from the executive stock; nor any legislative function, though they may be advised by the legislative councils. The entire legislature can perform no judiciary act, though by the joint act of two of its branches the judges may be removed from their offices, and though one of its branches is possessed of the judicial power in the last resort. The entire legislature, again, can exercise no executive prerogative, though one of its branches constitutes the supreme executive magistracy, and another, on the impeachment of the third, can try and condemn all the subordinate officers in the executive department.¹⁰

Separation of powers and checks and balances, however, were not the only principles on which the Constitution should rely. There was a third one that to the framers was even more important than the others: federalism. In fact, because they feared the power of a central government without any counter-power allocated to the states, they included in the Constitution the

⁸ Ibid.

⁹ Madison, "The Federalist No. 47," 302.

¹⁰ Ibid., 303.

principle of federalism, "...a device by which a republic as large as that of the United States in 1787 might share power with the states."¹¹ According to Edward S. Corwin and Jack W. Peltason,

A federalist government is one in which a *constitution* divides governmental power between a central and subdivisional governments, giving to each substantial functions....In a federal system...the constitution is the source of both central and subdivisional authority and each unit has a core of power independent of the wishes of those who control the other level of government.¹²

Arthur E. Sutherland, cited by Louis Fisher, merges the separation of powers and federalism in one single concept. In this vein, Sutherland affirms that one of the elements restraining government is the structure "...dividing power between the nation and the states, and then again within the central government (creating separate executive, legislative, and judicial bodies)."¹³ Carl Friedrich, also cited by Fischer, subscribes to the merging of these two principles when he states that "...the division [separation] of powers cuts across two planes: functionally (separation of powers) and spatially (federalism)."¹⁴

Summing up, separation of powers, checks and balances, and federalism are the three principles on which the U.S. Constitution relies to insure the freedom of the people from any form of tyrannical government, which was the main concern of the framers. As David P. Currie points out, it is through the convergence of these three principles that the liberty of the people can be insured:

The principle of *federalism* limits official oppression by dividing powers between the nation and its constituent states; that of *separation of powers* does so by allocating authority among the three branches of the federal government. The

¹¹ Morris, "The Origin and Framing of the Constitution," 43.

¹² Corwin and Peltason, *Understanding the Constitution*, 21.

¹³ Fisher, *Constitutional Conflicts between Congress and the President*, 9.

¹⁴ Ibid.

principle of *checks and balances* provides further protection by giving one branch authority in many cases to impede misguided or illegal actions of another.¹⁵

B. THE CONSTITUTIONAL PRINCIPLES APPLIED TO WAR POWERS

In granting constitutional war powers, the framers followed the general pattern of separation of powers, checks and balances, and federalism. Yet since they acknowledged the need for one unified army capable of controlling and coordinating war efforts, which meant some level of control over the militia, the principle of federalism had to be applied in a special manner. There is no doubt that the framers knew both the risks of granting war powers as a whole to the national government and the consequences of centralizing these powers in only one branch of this national government. Yet they were also convinced of the necessity of insuring to the Union protection against dangers that the nation might have to face, which meant the creation of centralized armed forces. John Jay referred to these dangers in affirming that "[a]t present I mean only to consider it as it respects security for the preservation of peace and tranquility, as well as against dangers from *foreign arms and influence*, as from dangers of the *like kind* arising from domestic causes."¹⁶ Jay called for granting to the federal government the powers to protect the nation from these dangers. Asserting that the safety of the whole ought to be provided by one centralized government, Jay argued,

One government can collect and avail itself of the talents and experience of the ablest men, in whatever part of the Union they may be found. It can move on uniform principles of policy. It can harmonize, assimilate, and protect the several parts and members, and extend the benefits of its foresight and precautions to

¹⁵ David P. Currie, *The Constitution of the United States: A Primer for the People* (Chicago, IL: The University of Chicago Press, 1988), 2.

¹⁶ John Jay, "The Federalist No. 3," in *The Federalist Papers*, 42.

each. In the formation of treaties, it will regard the interest of the whole, and the particular interests of the parts as connected with that of the whole.¹⁷

In the same manner, addressing the principal purposes to be served by the Union, Alexander Hamilton placed at the top of the list "...the common defense of the members and the preservation of the public peace, as well against internal convulsions as external attacks...."¹⁸ Calling for federal powers without limitations, Hamilton argued that these authorities should provide "...for the defense and the protection of the community in any matter essential to its efficacy—that is, in any matter essential to the *formation, direction, or support* of the NATIONAL FORCES."¹⁹

In crafting a model considering both the liberty of the people and the security of the nation, the framers developed a master plan that would take into account among other elements the specific dangers to be faced. With respect to these, they acknowledged that war might come from many directions.²⁰ First, the United States was a menace to the European nations, which might see it as very powerful in view of "...its rich resources, its trade, and its population expanding into the interior of a vast continent abundant in raw materials...."²¹ Second, if as a result of independence from Great Britain there were only smaller states instead of a union of them, "European nations would certainly attempt to assert their control, or to play one state against another."²² Third, the framers foresaw threats along nation's borders—the British in Canada, the

¹⁷ John Jay, "The Federalist No. 4," in *The Federalist Papers*, 47-48.

¹⁸ Alexander Hamilton, "The Federalist No. 23," in *The Federalist Papers*, 153.

¹⁹ *Ibid.*, 154.

²⁰ Richard Kohn, "The Constitution and National Security," in *The United States Military under the Constitution of the United States*, 64-68.

²¹ *Ibid.*, 64.

²² *Ibid.*

Indians in the West, and the Spanish in Florida and Louisiana.²³ Fourth, danger could arise from the United States' proximity to the Atlantic Ocean, both because the country's economy could be vulnerable to transatlantic trade and because the Atlantic could be used as a route for invaders.²⁴ Finally, a threat could come from internal insurrection and rebellion of people unsatisfied with the way in which the Union was managing matters that might affect them.²⁵

In order to prevent these dangers, but also to assure that the military power to be created would not put at risk the political stability of the country or the freedom of the people, the framers established a national defense structure based on three pillars. The first of these was "to empower the government to possess a military establishment in peacetime."²⁶ This first task had two aspects: the idea of strengthening "defense in the union [instead of relying] on the states individually....,"²⁷ and the conviction that the defense of the nation would succeed only if the assets to be employed were prepared in peacetime. The second pillar was to make the government more effective in fighting wars, which led to the idea of having a strong executive conducting the armed forces militarily, once Congress had made the decision to go to war.²⁸ Based upon this idea, the delegates at the Philadelphia convention accepted the amendment that James Madison and Elbridge Gerry introduced to the draft of the Constitution granting to Congress the power to

²³ Ibid.

²⁴ Ibid., 65.

²⁵ Ibid., 66.

²⁶ Ibid., 71.

²⁷ Ibid., 70.

²⁸ Ibid., 77.

“declare” war instead of the power to make it, therefore transferring the latter power to the president.²⁹

The third pillar was “...to insure that the set of institutions [the framers]... were permitting would not themselves pose a threat to the security of the country.”³⁰ To prevent this risk, the framers crafted three devices. The first was to control the military power by placing the authority to create it “in Congress rather than the President” and structuring a bicameral system, whose chambers would “have to agree independently on the need for an army and the resources for its support.”³¹ The second was to distribute war powers between the President and the Congress, “...so that no one branch was fully in control. Congress created the Army, paid it, made rules for its organization and governance, and otherwise determined its character and institutional structure. The President held the reins of command....”³² The third, in case the previous safeguards did not work, and in case the army intended to seize power, was to rely upon the militia as the ultimate resource to counterbalance the power of the national army. In an attempted military coup, the army “...would face hostile citizens armed and embodied in militia, ready to defend their liberties.”³³ In order to maintain an independent militia that would be able to carry out this task, the Philadelphia convention reached a compromise solution, granting to each state the power to appoint the officers and to train the militia according to the discipline prescribed by Congress. In this regard, asked Hamilton, “What reasonable cause of apprehension can be inferred from a

²⁹ Louis Fischer, *President and Congress: Power and Policy*, 1st paperback ed. (New York, NY: The Free Press, 1973), 158.

³⁰ Kohn, “The Constitution and National Security,” 81.

³¹ *Ibid.*, 71

³² *Ibid.*, 84.

³³ *Ibid.*, 85.

power in the Union to prescribe regulations for the militia and to command its services when necessary, while the particular States are to have the *sole* and *exclusive appointment* of the *officers*?"³⁴

By the implementation of this master plan the fundamental objectives of the framers regarding national security were to be accomplished. The ultimate objective was to have "a government empowered to raise military and naval forces in peace as well as war; a government more efficient in the conduct of war and military operations; [and] a government so constructed that its military forces could neither attempt nor become the instrument for a coup d'etat."³⁵

C. TOWARD A SHARED POWERS DOCTRINE

How is the theory of separation of powers embodied in the Constitution to be interpreted? This is a crucial question to resolve with respect to the conflict between the executive and legislative branches of government over war powers. This is so because if, on the one hand, separation of powers meant that each branch was allowed to practice specific and isolated powers, without any contact between them, then the conflict would not exist; whereas if, on the other hand, the Constitution makes the branches share war powers in addressing each particular situation, then conflict would likely arise if the president and Congress did not work together upon amicable and mutually understanding basis.

In this matter, Martin Wald states that theoretically there are two distinctive avenues of approach to the topic: divided powers and shared powers.³⁶ In describing the first approach Wald

³⁴ Alexander Hamilton, "The Federalist No. 26," in *The Federalist Papers*, 186.

³⁵ Kohn, "The Consitution and National Security," 85.

³⁶ Martin Wald, *The Future of the War Power Resolution* (Stanford Law Review, July 1984), 7; available [Online]: LEXISNEXIS/ LAWREV/ALLREV/ (U.S. Supreme Court and War Powers and *INS v Chadha*), [March 05,1999].

states, "...specific functions or 'powers' are assigned to each of the branches or are inherent in their roles. Under this approach, the problem consists of deciding which functions belong to which branch,"³⁷ and the conclusion is that "if the President gets his powers directly from the Constitution...then they cannot be limited by acts of Congress."³⁸ The second approach is the sharing of powers by the branches. In this approach, according to Wald, "...the Constitution is only 'an invitation to struggle' for control of defense and foreign policy, and...the political branches must work out an accommodation, in each particular situation."³⁹

Reviewing the intention of the framers as expressed in *The Federalist*, it seems that through blending the theories of separation of powers and checks and balances they were looking for a shared powers structure. Asserting the judiciary role of the Senate as a court for the trial of impeachment, Alexander Hamilton asserted that "[t]he true meaning of [separation of powers]...[had] been shown to be entirely compatible with a partial intermixture of those departments for especial purposes, preserving them, in the main, distinct and unconnected."⁴⁰ Furthermore, according to Hamilton, "[t]his partial intermixture is even, in some cases, not only proper but necessary to the mutual defense of the several members of the government against each other."⁴¹ In the same vein, using the examples of the British and the several state constitutions, James Madison argues that, conversely to the idea that sharing powers conflicts with

³⁷ Ibid., 8.

³⁸ Ibid.

³⁹ Wald, *The Future of the War Power Resolution*, 9.

⁴⁰ Alexander Hamilton, "The Federalist No. 66," in *The Federalist Papers*, 401.

⁴¹ Ibid.

the theory of separation of powers, it preserves it "...in favor of liberty."⁴² Madison affirms that in the Constitution "[t]he several departments of power are distributed and blended in such a manner as at once to destroy all symmetry and beauty of form, and to expose some of the essential parts of the edifice to the danger of being crushed by the disproportionate weight of the parts."⁴³

Following the same path, it seems that there is general agreement among constitutional scholars that the Constitution was drafted according to the approach of sharing powers, which contributed to the uncertainty over which institution had the constitutional right to exercise specific powers. Confirming the argument that the Constitution follows the shared powers theory, John Yoo states, "As with all constitutional questions, an analysis of war powers should begin with the constitutional text, which allocates war-making authority not to a single branch of government."⁴⁴ According to Edward Keynes, the framers set forth the sharing of powers in pursuit of a system in which it would be possible to balance the requirements of liberty and order.⁴⁵ Therefore, war powers were "...anchored in a constitutional system that shares and partially separates responsibility between the legislative and executive branches."⁴⁶

Although there is general agreement that the Constitution sets forth the shared powers doctrine, there is a diversity of opinions on how to apply this doctrine in each particular matter. This problem of constitutional interpretation arises from the fact—which scholars also agree on—that the Constitution is ambiguous about, among others issues, the allocation of powers, which

⁴² Madison, "The Federalist No. 47," 301.

⁴³ Ibid.

⁴⁴ John Yoo, *The Continuation of Politics by Other Means* (California Law Review, March 1996), 9; available [Online]: LEXISNEXISLAWREV/ALLREV (War Powers and U.S. Constitution), [March 04, 1999].

⁴⁵ Keynes, *Undeclared War: Twilight Zone of Constitutional Power*, 57.

⁴⁶ Ibid., 56.

leads to the problem of how to share these powers. This problem seems to stem from the lack of details that would permit to understand the intention of the framers in each constitutional prescription, including the allocation of responsibility for national security. Because of this feature, Edward S. Corwin, cited by Professor Frederick S. Tipson, describes the Constitution as “an invitation to struggle’ for authority to make decisions on matters of national security.”⁴⁷ Gerald Casper affirms in this vein that “...the very centrality of the separation of powers doctrine in the last quarter of the eighteenth century quickly produced a sharpened sense of its uncertainty as the ‘first constitutional generation’ encountered specific tasks of governmental organization and statecraft.”⁴⁸ Linda Chaplin and Alan Schwarz specifically attribute this problem to the framers when they state,

...it may be difficult, or impossible, to resolve an allocation question. The framers, perhaps, intended to resolve the issue but stated it inartfully, or they never thought of the problem—a true lacuna. Or, they thought of the problem but could not agree on the resolution, leaving the stalemate to future decisions by someone else. Or they thought of the problem but agreed that resolution could not be constitutionalized or at least not constitutionalized then. Resolution should vary over time depending upon the shape of the world and the role of the United States in that evolving world.⁴⁹

Supporting the argument that the framers were aware of this ambiguity, Edward Keynes points out that the real reason the Constitution was written in such a manner might have to do with the difficulty of agreeing on the details. In this vein, Keynes argues that “...the framers [might] deliberately have employed ambiguity as a technique of compromise to dissolve seemingly

⁴⁷ Frederick S. Tipson, “National Security and the Role of Law,” in *National Security Law*, ed. John Norton Moore, Frederick S. Tipson, and Robert F. Turner (Durham, NC: Carolina Academic Press, 1990), 28.

⁴⁸ Casper, *Separating Powers: Essays on the Founding Period*, 86.

⁴⁹ Linda Champlin and Alan Schwarz, *Political Question Doctrine and Allocation of the Foreign Affairs Powers* (Hofstra Law Review, Winter 1985), 155; available [Online]: LEXISNEXISLAWREV/ALLREV (War Powers and U.S.

irreconcilable conflicts, to reduce differences of principle to matters of interest.”⁵⁰ Therefore, concludes Keynes, any effort to interpret the Constitution according to a specific standard is futile because any such interpretation can “...turn a constitutional doubt, created by the absence of an exclusive commitment of power, into a logical certainty.”⁵¹

Even though the Constitution does not specifically assign the task of constitutional interpretation to the judiciary (“judicial review”), this role was set forth in *Marbury v. Madison*, a landmark decision written by Chief Justice John Marshall in 1803, establishing the right of the judicial branch to pass on the constitutionality of an act of Congress, thereby setting forth the functions and prerogatives of the judiciary in its relation to the legislative branch.⁵²

The ambiguity of the Constitution, however, is not necessarily a negative feature of the Constitution. On the contrary, one of the most relevant elements of the U.S. “Supreme Law of the Land” is its stability throughout the centuries. In fact, the Constitution has suffered only 26 amendments since the delegates at the Philadelphia convention signed it on September 17, 1787, 10 of which were the result of a compromise that followed immediately after the signing, in order to gain ratification by the requisite number of states.⁵³ In terms of national security affairs, this ambiguity has turned out to be a positive factor in that the historical evolution of the political, strategic, and technological environment of warfare has not made it necessary to amend the provisions set forth in the Constitution. In this matter, Keynes affirms that the framers were simply not capable of foreseeing the threats and dangers the United States was going to face in the

Constitution), [March 04, 1999].

⁵⁰ Keynes, *Undeclared War: Twilight Zone of Constitutional Power*, 33.

⁵¹ Keynes, *Undeclared War: Twilight Zone of Constitutional Power*, 33.

⁵² Henry Campbell Black, *Black’s Law Dictionary*, 6th ed. (St. Paul, MN: West Publishing CO, 1998), 966.

future. Thus, "given their inability to predict future contingencies...[the framers]...left many questions of presidential-congressional relations to be settled in practice, through the inevitable conflicts that the separation and sharing of legislative and executive powers would generate."⁵⁴

Legally speaking, the "open door" feature of the Constitution with respect to how to apply the shared powers doctrine suggests the necessity of building a framework that could generate specific rules according to the present needs. These needs are related mainly to both the political and the strategic features that shape the way in which an international crisis must be managed: political features in that there must be a solution by which relations between president and Congress regarding this issue can be conducted upon an amicable and cooperative basis, and strategic features in that military assets must be deployed and employed according to the variables that modern warfare sets in place.

This argument is backed by a theoretical approach known as "formal war/shared power,"⁵⁵ which means that the Constitution only establishes broad markers in a large area of concurrent power, thus not "...[focussing] upon specific patterns or categorizing cases but instead [drawing] more general conclusions from history."⁵⁶ According to this approach, the way the president and Congress should share war powers comes from the Constitution in the sense that it provides the original understanding and principles to be applied no matter the features of each situation. Yet this guidance must be complemented with specific regulations in order to match the special

⁵³ These 10 amendments eventually became known as the "Bill of Rights."

⁵⁴ Ibid., 33.

⁵⁵ Jane E. Stromseth, "Understanding Constitutional War Powers Today: Why Methodology Matters," *The Yale Law Journal* 106, December 1996 [journal on-line]; available from <http://proquest.umi.com/pqdweb>; Internet; accessed August 19, 1999, 857.

⁵⁶ Ibid.

conditions in which war powers must be used in each situation. To put it in a different way, the Constitution sets forth the shared powers doctrine, yet it does not prescribe how to put it into effect.

Before it delves into specific regulations, the thesis must address the legal framework that the Constitution and statutory laws have set forth with respect to war powers, and also the way in which this framework has performed since it was enacted. The study will then make policy recommendations for shaping the relationship between the president and Congress regarding the sharing of war powers today. According to this plan, the next chapter will describe and analyze the legal framework on war powers.

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III. THE LEGAL FRAMEWORK ON WAR POWERS

A. SOURCE AND SCOPE OF WAR POWERS

Since the Constitution was enacted, there have been different approaches to explaining the source and scope of the war powers. Writing in *The Federalist*, Alexander Hamilton described the war powers as an aggregate of the particular powers granted to Congress by Article I, Section 8 of the Constitution.⁵⁷ Later, in 1795, the theory developed the belief that the "...war power is an attribute of sovereignty and hence not dependent upon the affirmative grants of the written Constitution."⁵⁸ Chief Justice Marshall took a different approach, affirming that "...the power to wage war is implied from the power to declare it."⁵⁹ Thereafter, the war powers were considered an inherent power, in the sense that they were originated by the colonies "...in their collective and corporate capacity as the United States of America."⁶⁰ As a result, "...the investment of the Federal Government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution...[I]f they had never been mentioned...[they] have vested in the Federal Government as necessary concomitants of nationality."⁶¹ Finally, the war powers were also

⁵⁷ Alexander Hamilton, "The Federalist No. 23," in Congressional Research Library of Congress, *The Constitution of the United States of America: Analysis and Interpretation*, ed. Johnny H. Killian and George A. Costello (Washington, D.C.: U.S. Government Printing Office, 1996), 306.

⁵⁸ Congressional Research Library of Congress, *The Constitution of the United States of America: Analysis and Interpretation*, 306.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid.

understood as belonging to the federal government as a result of specific enumerated powers granted by the Constitution to the Congress and to the President.⁶²

Despite these different approaches, there is a consensus that the war powers ought to be interpreted according to the constitutional principles discussed in Chapter II—i.e., separation of powers, checks and balances, and federalism, including the shared powers doctrine. Following these principles, the framers vested the war powers in the executive and legislative branches of the federal government. As Louis Fisher summarizes,

The Constitution gives Congress the power to declare war but makes the President the commander in chief; in this way the power is divided. Although the President commands the armed forces, the Constitution empowers Congress to raise and support armies, provide and maintain a navy, and make regulations for the military force. The power of the purse is vested solely in Congress.⁶³

The war powers were included in the Constitution in Article I and in Article II, making provision for the powers of the Congress and the President. In this vein, Article I, Section 8, enumerates the powers vested in the Congress, specifying those referred to as war powers in clauses 11 through 16. Likewise, Article II grants to the President the power to be the “Commander in Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual service of the United States” (commander-in-chief clause). This chapter describes and analyzes each of these enumerated powers, looking for the correct application of them to reality. It also addresses why and how the war powers were included under statutory law.

⁶² Ibid.

⁶³ Louis Fisher, *The Politics of Shared Powers: Congress and the Executive*, 3d ed. (Washington, D.C.: CQ Press, 1993), 145.

B. DESCRIPTION AND ANALYSIS OF THE CONSTITUTIONAL WAR POWERS

The Constitution grants to the Congress and to the President a list of enumerated war powers in order to provide security to the United States. These enumerated powers, as was mentioned before, are described in the Constitution in an ambiguous way, which contributes to the emergence of political disputes between the President and the Congress. In this regard, this section addresses the war powers granted in the Constitution both to the President and to the Congress, describing them and delving into those elements that are considered to be controversial.

1. Congressional War Powers

Article I, Section 8 of the Constitution says "*The Congress shall have Power: To declare War, ...[clause 11]; To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years [clause 12]; To provide and maintain a Navy [clause 13].*"

a. To Declare War

The declaration-of-war clause is written in such a vague way that it is not easy to understand its significance. This fact raises the issues of how to properly interpret its meaning and how to formally put it into effect. Regarding its meaning, there is a consensus among constitutional scholars that by letting Congress declare war the framers expressed their intention to retain in Congress' domain the offensive war powers, issuing the defensive war powers to the President. This understanding is taken from the discussion that the framers had on the initial draft presented to the Convention, in which Congress was vested with the power to "make" war. In Charles Pinckney's view, assuming that Congress would only meet once a year, granting this power to the legislative body it "... might be 'too slow' for the safety of the country in an emergency."⁶⁴ Supporting Pinckney's concern, James Madison and Elbridge Gerry introduced the idea of

⁶⁴ Ibid., 158.

substitutuing the expression "declare" for "make," "leaving to the Executive the power to repel sudden attacks." In the end this motion carried and, therefore, became part of the Constitution.⁶⁵ Thus, by the enumerated power to declare war Congress retains the constitutional obligation to authorize offensive actions against the enemy, leaving to the President the duty to employ military forces to repel sudden attacks against the United States.

The distinction between defensive and offensive wars was recognized by the U.S. Supreme Court in the *Prize* case, in which the judiciary ruled in favor of President Lincoln, stating that it was within his power to blockade southern ports during the American Civil War. The court stated:

By the Constitution, Congress alone has the power to declare a national or foreign war.... [The President] has no power to initiate or declare a war against a foreign nation or a domestic state....[But] if a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but its bound to accept the challenge without waiting for any special legislative authority.⁶⁶

Repelling sudden attacks, however, does not clarify the exact meaning of defensive war. According to Louis Fisher, "Throughout the nineteenth century the concept of defensive war was limited mainly to protective actions along the borders of the United States. Naval actions against the Barbarian pirates and France stretched those boundaries, but such actions were infrequent."⁶⁷ Yet it is not necessary to say that this meaning of defensive war is no longer valid. In this vein, Fisher points out that "after World War II the idea of defensive war takes a quantum jump, both conceptually and in practice. American bases were dispersed around the

⁶⁵ Ibid.

⁶⁶ Robert F. Turner, *The War Powers Resolution: Its Implementation in Theory and Practice* (Philadelphia, PA: Foreign Policy Research Institute, 1983), 18.

⁶⁷ Fisher, *Constitutional conflicts between Congress and the President*, 292.

globe. Military commitments became imbedded in various pacts and treaties, often with little visibility to Congress or to the public.⁶⁸ This broader new meaning of the concept adds to the difficulty of distinguishing between offensive and defensive war that of deciding what measures to take in order to face the dangers.⁶⁹ This new meaning would imply also increasing executive war powers, which would lead to a political conflict between the President and Congress. Because this issue is very much related to the presidential war powers, it is worth continuing its discussion later on, when the commander-in-chief clause is addressed.

With respect to how to put formally a declaration of war into effect, the Constitution does not give any guidance. For this reason it was the Supreme Court, under its judicial review authority, which issued a legal response as to how to handle this matter, ruling that event though a war may not be declared in a formal manner, it still could be considered as such if it matches certain requirements. As Robert F. Turner points out, in 1800 the Supreme Court's Justice Washington reasoned in *Bas v. Tingy*,

It may, I believe, be safely laid down, that every contention by force, between two nations, in external matters, under the authority of their respective governments, is not only war, but [also] public war. If it be declared in form, it is called solemn, and is of the perfect kind; because one whole nation is at war with another whole nation; and all the members of the nation declaring war are authorized to commit hostilities against all members of the other, in every place and under every circumstance.... But hostilities may subsist between two nations, more confined in its nature and extent;...and this is more properly termed imperfect war; because not solemn, and because those who are authorized to commit hostilities act under special authority, and can go no further than to the extent of their commission. Still, however, it is a public war.⁷⁰

⁶⁸ Ibid.

⁶⁹ Keynes, *Undeclared War: Twilight Zone of Constitutional Power*, 38.

⁷⁰ Turner, *The War Powers Resolution: Its Implementation in Theory and Practice*, 32.

Historical practice follows the same distinction. In fact, the record demonstrates that in more than two hundred years of political and military history, on only five occasions has Congress declared war in a formal sense: the War of 1812, the Mexican War, the Spanish-American War, World War I, and World War II.⁷¹ Conversely, there have been over two hundred incidents in which the United States has acted militarily without such formal declaration of war.⁷² Taking into account the historical perspective, Robert Turner denies the sacred-formula approach to the declaration of war, stating that, "...the instrument has been seldom used, and even when used has had little or no influence on the actual decision to use force."⁷³ Arthur M. Schlesinger also brings this matter up, stating that in the process of making a distinction between the power of Congress to declare war and the presidential power to conduct it, the framers "...may have helped confuse later generations about the significance of the technical act of declaration. That was not the issue. The issue was congressional *authorization* of hostilities against a foreign state. Such authorization could be made through full-dress declaration or through more limited means."⁷⁴ Thus, what seems to be the accepted significance of a declaration of war is not the way it is implemented, but rather its content, in which it must be clear that Congress has given its approval to employ military forces in a war situation.

Summing up, it can be said that the power to declare war vested in Congress would apply only in situations of offensive wars, and this being the case, it would not be necessary

⁷¹ Donald L. Westerfield, *War Powers: The President, the Congress, and the Question of War* (Westport, CT: Praeger, 1996), Appendix D.

⁷² Westerfield, *War Powers: The President, the Congress, and the Question of War*, Appendix C.

⁷³ Turner, *The War Powers Resolution: Its Implementation in Theory and Practice*, 30.

⁷⁴ Arthur M. Schlesinger, Jr., *The Imperial Presidency* (Boston, MA: Houghton Mifflin Company, 1973), 21.

to declare war in any formal manner. These two elements—offensive vs. defensive war and formal vs. informal declaration of war—will come up again as the thesis proceeds.

b. *To Raise and Support Armies, and to Provide and Maintain a Navy*

The framers opted to discuss the army and the navy in separate clauses simply because they feared military attempts to take over the federal government from the former, but not from the latter. For this reason the Constitution provides that Congress may make appropriations of money for a term no longer than two years, but does not apply the provision to the navy.⁷⁵ This interpretation, nonetheless, has radically changed since the Constitution was enacted; thus, the limit on appropriations for the army applies now to the navy as well, and the army and navy clauses can therefore be explained as a whole—i.e., as granting the power to raise and support armed forces.

The framers decided to grant to Congress the power to raise and support armed forces in accordance with the idea that Congress must have the initiative in authorizing and appropriating the funds to be spent by the executive branch of the federal government. This power, known as the “power of the purse” and included in Article I, Section 8 of the Constitution, applied to war powers as well. Under this framework Congress has the constitutional power to issue funds to the President for preparing and conducting the armed forces toward the accomplishment of national security goals. By such division of powers the framers’ intention was to keep the President far away from the temptation to take the nation to war without previous

⁷⁵ Congressional Research Library of Congress, *The Constitution of the United States of America: Analysis and Interpretation*, 312.

congressional approval.⁷⁶ James Madison well explained this purpose under the idea of protecting constitutional liberties,⁷⁷ stating that

[t]hose who are to conduct a war cannot in the nature of things, be proper or safe judges, whether a war ought to be commenced, continued, or concluded. They are barred from the latter functions by a great principle in free government, analogous to that which separates the sword from the purse, or the power of executing from the power of enacting laws.⁷⁸

Applying the checks and balances principle as a limit to Congress' action, it is important to say that the idea of giving Congress the power to raise and support the armed forces does not give the legislative body the right to go beyond its constitutional rights by seeking the overall control of the armed forces. This might be relevant in the matter of war powers because, as will be discussed later, it is a presidential duty as commander in chief to conduct the armed forces in military operations. This duty entails also the necessity of organizing and training them to act efficiently in such situations, free from obstacles and from unnecessary opposition by other branches of government. This kind of opposition would interfere with the command function of the President and, thus, would be inconsistent with both the spirit and the letter of the Constitution.⁷⁹

2. Presidential War Powers

Article II, Section 2 of the Constitution says that "The President shall be the Commander in Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual Service of the United States...." In order to better understand this clause—

⁷⁶ Louis Fisher, *Presidential War Powers* (Lawrence, KS: University Press of Kansas, 1995), 8.

⁷⁷ Ibid.

⁷⁸ Letter from James Madison to Thomas Jefferson on April 2, 1798, in Fisher, *Presidential War Powers*, 9.

⁷⁹ John Norton Moore and Robert F. Turner, *The Legal Structure of Defense Organization*, memorandum prepared for the President's Blue Ribbon Commission on Defense Management (n.p., January 15, 1986), 122.

the so-called commander-in-chief clause—it is convenient to study it in conjunction with two other presidential clauses: the vesting and the take-care clauses. Article II, Section 1 of the Constitution states that the executive power shall be vested in a President of the United States of America; Section 3 of the same article mandates that the President take care that the laws be faithfully executed. It is important to study the commander-in-chief clause in relation to these other two clauses because the role of the President as commander in chief is related both to the meaning of the constitutional executive powers and also to the range of discretion within which the President is constitutionally mandated to faithfully execute the law.

With respect to the vesting clause, disagreement arises because of the Constitution's ambiguity on the meaning of the executive powers. Edward Keynes attributes this ambiguity to the framers' lack of a model by which to develop a clear definition of executive powers. In this matter, Keynes suggests that the framers might not have taken as models the executive powers of the governors of the states because their powers varied considerably.⁸⁰ Thus, according to Keynes, "[t]he lack of a model probably explains the controversy and confusion that attended the delegates' debates on the executive article."⁸¹ As a result of this lack of a model, Keynes argues:

Neither the constitutional text nor the Convention's debates conclusively resolve the continuing controversy over the scope of executive power. While some of the Framers favored a vigorous President with broad executive powers, others favored a weak chief magistrate with limited ministerial powers. The former group emphasized the need for energy, unity, dispatch, and secrecy, especially in conducting war and foreign affairs. The latter group emphasized the dangers to liberty and popular sovereignty arising from military dictatorship.⁸²

⁸⁰ Keynes, *Undeclared War: Twilight Zone of Constitutional Power*, 50.

⁸¹ *Ibid.*

⁸² *Ibid.*, 52.

This disagreement among the framers over the executive powers was clearly reflected in the way these powers are described in the Constitution, which gives rise to the difficulties of interpreting the vesting clause in Article II. In this matter, Keynes divides the different views into two approaches. The first one is the narrow approach, arguing that “the executive vesting clause merely provides for a single executive who exercises no more power than the second article specifically vests in the President.”⁸³ Conversely, the broad approach advocates that only the Constitution’s specific exceptions, limitations, and prohibitions limit the executive power.⁸⁴ Adherents of the latter view point out that, unlike the vesting clause of Article I, which explicitly limits the congressional powers to those granted in the Constitution, “the executive vesting clause contains no intrinsic limits on executive power.”⁸⁵

The disagreement over the executive vesting clause directly reflects upon the commander-in-chief clause, since the latter is one of the more important executive powers. On this subject opinions are also divided. To some scholars presidential war powers, which mostly originate in the commander-in-chief clause, must be interpreted narrowly. Taking this view, Louis Fisher argues,

There was little doubt about the limited scope of the President’s war power. The duty to repel sudden attacks represents an emergency measure that permits the President to take actions necessary to resist sudden attack.... The President never received a general power to deploy troops whenever and wherever he thought best, and the framers did not authorize him to take the country into full-scale war or to mount an offensive attack against another nation.⁸⁶

⁸³ Ibid., 51.

⁸⁴ Ibid.

⁸⁵ Ibid., 52.

⁸⁶ Fisher, *Presidential War Powers*, 7.

Arthur M. Schlesinger, arguing on the basis of Hamilton⁸⁷, asserts in the same vein that “[t]here is no evidence that his office as Commander in Chief endowed the President with an independent source of authority. Even with Washington in prospect, the Founders emphasized their narrow and military definition of his presidential roles.”⁸⁸

The broader view of presidential war powers is quite different. Noting the widespread dissatisfaction among the convention delegates over the excessive legislative war power and the Continental Congress’ inefficiency in handling defense issues regarding defense,⁸⁹ this view maintains that the “...President’s Commander-in-Chief power is beyond the reach of Congress.”⁹⁰ According to this view, Robert F. Turner affirms that “[i]n practice, as well as theory, the President’s power to use force has been broad.”⁹¹ In support of this statement Turner develops a historical argument in order to show how the branches of government have interpreted and applied the Constitution under this broader approach. Referring to the Tripoli War against the Barbarians, in 1801, Turner states, “[t]here appears to have been little opposition within Congress to President Jefferson’s decision to dispatch a squadron of armed fighting ships across the ocean and into a potentially hostile situation without formal congressional authorization.”⁹²

⁸⁷ According to Arthur Schlesinger, Hamilton had the narrow approach to Presidential powers when he explained in the *Federalist* no. 69 that these powers “...would amount to nothing more than the supreme command of the military and naval forces,” in Schlesinger, *The Imperial Presidency*, 6.

⁸⁸ Ibid.

⁸⁹ Moore and Turner, *The Legal Structure of Defense Organization*, 88.

⁹⁰ Ibid., 92.

⁹¹ Turner, *The War Powers Resolution: Its Implementation in Theory and Practice*, 29.

⁹² Ibid., 23.

Like the vesting clause, there has been a dispute over how to interpret the take-care clause, which mandates that the President “take care that the laws be faithfully executed.” Does the Constitution grant to the President any discretionary power not to obey the law when it might be considered unconstitutional? According to Edward Keynes, presidents have acted inconsistently in this matter. In this vein, Keynes argues that while presidents Andrew Johnson and Woodrow Wilson “...refused to enforce laws they viewed as unconstitutional...[t]wo strong Presidents, Andrew Jackson and Abraham Lincoln...argued that the President has no choice but to enforce the law.”⁹³ It is important to bear this topic in mind because one of the issues that will come up later has to do with the presidents’ unwillingness to comply with a statutory law that mandates them to follow specific procedures if they decide to deploy troops overseas in war situations. In this matter, presidents have repeatedly justified non-compliance based on the unconstitutionality of the law.

Summing up, the commander-in-chief, vesting, and take-care clauses included in Article II, Section 8 of the Constitution, must be seen as interacting with one to another as they act on the governmental decision making process. As Keynes points out, “[b]y defining executive power broadly and by wedding the commander in chief clause to the take-care clause, such aggressive presidents as Lincoln, Wilson, the two Roosevelts, Johnson, and Nixon have converted the Constitution’s silence on the meaning of executive power into a claim for unlimited executive power to make foreign and military policy.”⁹⁴

Another important element that is worth going back to is the conceptual distinction between defensive and offensive wars. As was mentioned, constitutional interpretation makes a

⁹³ Keynes, *Undeclared War: Twilight Zone of Constitutional Power*, 55.

⁹⁴ *Ibid.*, 20.

difference between defensive and offensive wars. The former means that "[a]s civilian commander in chief, the President is responsible for superintending the armed forces...defending the nation, its armed forces, and its citizens and their property against attack...."⁹⁵ The latter means the power "to initiate war or military hostilities, to transform defensive actions into aggressive wars...."⁹⁶ It is not easy, nonetheless, to make such a distinction in practice. As Keynes argues,

Against a background of royal prerogative, what powers did the Constitution's authors intend Congress and the President to exercise? Without a declaration of war or other legislation authorizing limited war or military hostilities, how far can the President go in taking defensive actions before he exceeds the authority that the Constitution confers on his office?⁹⁷

Since the Constitution does not explicitly respond to these questions, it seems necessary to build a framework of reference, foreseeing the circumstances in which the President might have to employ defensive war powers. These special circumstances, of course, might vary from time to time. Louis Fisher, writing in 1973 about presidential war powers, argued that the President's power as commander in chief had grown in response to three major components:

First, the President acquired the responsibility to protect American life and property abroad.... Second, the time boundaries of the "war period" have become increasingly elastic. The President may initiate military operations before congressional action, and he retains wartime powers long after hostilities have ceased. Third, [during] the postwar period,...greater U.S. world responsibilities [have] accelerated the growth of presidential power.⁹⁸

These three components envisioned by Fisher have certainly changed since the time he elaborated on them, yet these changes do not necessarily lead to a diminishment of presidential

⁹⁵ Ibid., 3.

⁹⁶ Ibid.

⁹⁷ Ibid.

war powers. In the present time the world is living in what is called the post-Cold War period, which involves new and different challenges, both political and military. In this environment, at least two new components have arisen significant: Low Intensity Conflicts (LIC) and United Nations military operations. With regard to LIC, even though this kind of war has always been fought, the decline of the Soviet Union and the consequent disappearance of the bipolar world has resulted in the increasing utilization of LIC, in which U.S. forces have become permanent participants. Since these conflicts might threaten the life and property of American citizens abroad, or even put at stake U.S. national interests, it could be argued that LIC could fit under the concept of defensive wars, thus broadening that concept. Accordingly, the President could use defensive war powers granted in the Constitution to the executive branch to send U.S. forces without congressional authorization to fight LIC, in total compliance with the Constitution. Regarding the United Nations, increased United States participation in U.N. military operations has raised the issue of whether the President can use a U.N. Security Council resolution as a replacement for congressional approval to commit troops. Even though U.S. participation in U.N. operations does not necessarily fall under the concept of defensive war, it is worth considering it as a component of the new political environment in which the constitutional debate between presidents and the Congress regarding war powers is taking place.

According to what has been described and analyzed, the ambiguity of the Constitution have made it difficult to find one single interpretation of war powers. This fact, plus specific features of both the foreign and domestic U.S. environments in the early 70's caused Congress to seek a clarification of this matter by legislative means. The next section will delve into this effort.

⁹⁸ Fisher, *President and Congress: Power and Policy*, 175.

C. THE WAR POWERS RESOLUTION

Due to the different interpretations of constitutional war powers, which led Congress to disagree with the way presidents were implementing them, the legislative body has set forth statutory limits on presidential powers to commit U.S. forces in war situations. What triggered this effort was the strong opposition that American participation in the Vietnam War was facing within the United States. In order to understand why Congress passed the War Powers Resolution it is worth reviewing the events that preceded its enactment into law.

Under the pattern of the strategy of containment against Communism, in the 1950s the United States decided to get involved in Indochina. The French were the first beneficiaries of this decision, receiving American aid in the re-building of French colonialism in the region.⁹⁹ Thereafter the United States sided with the non-Communist State of Vietnam, which had obtained independence from France.¹⁰⁰ Finally, "sending a firm signal to the Communist world that the United States and its allies would help defend future victims....,"¹⁰¹ in February 1955 the U.S. Senate consented by a vote of 82 to 1 to the ratification of the Southeast Asia Collective Defense (SEATO) Treaty,¹⁰² extending its containment doctrine to Southeast Asia. Article IV of the Treaty provided:

Each party recognizes that aggression by means of armed attack in the treaty area against any of the Parties or against any State or territory which the Parties by unanimous agreement may hereafter designate, would endanger its own peace

⁹⁹ Robert F. Turner, *Repealing the War Powers Resolution: Restoring the Rule of Law in U.S. Foreign Policy* (Washington, DC:Macmillan Publishing Company, 1991), 10.

¹⁰⁰ Ibid., 12.

¹⁰¹ Ibid.

¹⁰² Turner, *The War Powers Resolution: Its Implementation in Theory and Practice*, 2.

and safety, and agrees that it will in that event act to meet the common danger in accordance with its constitutional processes.¹⁰³

Additionally, the parties attached to the Treaty a protocol by which they unanimously designated for the purposes of Article IV of the Treaty the States of Cambodia and Laos and the free territory under the jurisdiction of the State of Vietnam.¹⁰⁴ Thus, as Robert Turner points out, "by 1955, with the overwhelming approval of the U.S. Senate...the United States was committed to defend South Vietnam, Cambodia, and other states covered by the treaty in the event U.S. assistance was requested following an armed attack."¹⁰⁵

In accordance with the SEATO Treaty provisions, the United States began increasing its participation in supporting South Vietnam in her fight against the Communist forces. By 1964, under the Lyndon Johnson administration, about 16,000 troops were stationed in South Vietnam as military advisors.¹⁰⁶ In this matter, unlike President Truman in the Korean War, President Johnson acknowledged that if he wanted to maintain American support for South Vietnam he was going to need the approval of Congress for keeping and increasing military forces in the region. In pursuing this support, President Johnson developed a political strategy vis a vis Congress. He initiated a consultation process with members of both chambers, which he hoped would eventually permit him to ask official congressional support for committing U.S. forces to fight against the Communist threat. After making the consultation process "an established practice,"¹⁰⁷ in August 1964 President Johnson requested formal legal authorization from the Congress to use military force in

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid., 13.

¹⁰⁶ Westerfield, *War Powers: The President, the Congress, and the Question of War*, 2.

¹⁰⁷ Turner, *The War Powers Resolution: Its Implementation in Theory and Practice*, 4.

Indochina. In response to the presidential request, on August 7, 1964, Congress passed the "Joint Resolution to Promote the Maintenance of International Peace and Security in South East Asia," better known as the Gulf of Tonkin Resolution.

In order to insure the approval of this resolution, President Johnson took advantage of a confusing armed incident that had occurred in the Gulf of Tonkin between two American destroyers and North Vietnamese torpedo boats. The Gulf of Tonkin incident was described in a U.S. House of Representatives Committee on Foreign Affairs document as follows:

On August 2, 1964, the U.S. Department of Defense reported that three North Vietnamese PT boats had fired at the U.S. destroyer *Maddox* while it was on a routine patrol off North Vietnam. Three days later it announced that another engagement had been fought between the *Maddox* [sic], the destroyer *C. Turner Joy* and North Vietnamese vessels, again in international waters. Both attacks had occurred in the Gulf of Tonkin.¹⁰⁸

This report, however, was not as accurate as it appeared to be. In this vein Edwin E. Moise argues that the report was an error: "The night was very dark, and the radar was playing tricks and showing ghost images that the men on the destroyers mistakenly interpreted as hostile vessels. The United States, however, reacted strongly to this supposed attack on the American flag. On August 5, American aircraft carriers launched air strikes against North Vietnam."¹⁰⁹

The Vietnam War represented a landmark for the American society regarding sending U.S. troops to fight overseas. As Donald L. Westerfield points out, "No previous war or foreign conflict had been so universally rejected by both the civilian and military [sic] as the Vietnam conflict. There also had never been such a flagrant disregard for the constitutional division of powers and

¹⁰⁸ U.S. House of Representatives Committee on Foreign Affairs, *The War Powers Resolution: A Special Study of the Committee on Foreign Affairs* (Washington, D.C.: U.S. Government Printing Office, 1989), in Westerfield, *War Powers: The President, the Congress, and the Question of War*, 2.

¹⁰⁹ Edmund S. Muskie, Introduction to *The Constitution and National Security*, ed. Howard E. Schuman and Walter R. Thomas (Washington D.C.: National Defense University Press), xxvi.

such a misuse of executive power as the extension of the war into Laos and the bombing in Cambodia.”¹¹⁰ Taking into account the way the Gulf of Tonkin Resolution was enacted, and the political, social, and military consequences of the Vietnam War, in 1973 Congress sought to define by legislation the “...parameters of the President’s war powers and even to restrain or curtail military appropriations.”¹¹¹ This legislation was the War Powers Resolution, enacted in 1973 over President Nixon’s veto. The presidential argument for vetoing the resolution relied on the impracticality of fixing in a statute the procedure by which President and Congress would share the war powers.¹¹² It also was argued that the War Powers Resolution included requirements that were manifestly unconstitutional. Despite these arguments, Congress overrode President Nixon’s veto by votes of 284 to 135 in the House and 75 to 18 in the Senate.

The resolution was embodied in 10 sections. Section 2 includes the purpose of the resolution, which is “to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgement of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.”¹¹³ This purpose reflects two relevant motives. First, it shows Congress’ intent to link the War Powers Resolution with the Constitution itself, trying to make the constitutional war powers more workable within the political decision making process. Second, it mirrors the congressional hope that the President and Congress would find this law useful as a means to exercise war powers on an understanding and

¹¹⁰ Westerfield, *War Powers: The President, the Congress, and the Question of War*, 1.

¹¹¹ Morris, “The Origin and Framing of the Constitution”, 51

¹¹² Fisher, *Constitutional conflicts between Congress and the President*, 309.

¹¹³ *War Powers Resolution*, Publ. L. No. 93-148, 2(a), 87 Stat. 555 (1973), codified at 50 U.S.C. 1541 (a) (1988), in

amicable basis. It is important to bear these two elements in mind because both will later be discussed as benchmarks for judging to what extent these purposes were accomplished. Section 2 also contains the policy of the resolution, which allows the President to exercise his powers as commander in chief "only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."¹¹⁴ Sections 3, 4, and 5 of the resolution contain the three main procedures set forth in the resolution: presidential consultation with Congress, presidential reports to Congress, and congressional termination of military action.¹¹⁵ These procedures are detailed in Appendix 1.

Section 8 of the resolution sets forth the interpretation clause, which clarifies that the authority to introduce United States Armed Forces in the situation before described is not be inferred from any provision of law, unless such provision specifically authorizes the introduction of United States Armed Forces into such situations.¹¹⁶ This section also states that nothing in the resolution is intended to alter the constitutional authority of the Congress or of the President, or the provisions of existing treaties.¹¹⁷ Finally, Section 9 includes a separability clause, which expresses that if any provision of the resolution or the application thereof to any person is held invalid, the remainder of it or the application of such provision to any other person or circumstance will not be affected thereby.¹¹⁸

Turner, *The War Powers Resolution: Its Implementation in Theory and Practice*, 143.

¹¹⁴ Ibid.,

¹¹⁵ Fisher, *Constitutional conflicts between Congress and the President*, 310.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

The War Powers Resolution represents a key element in the framework of disputes between presidents and Congress since it was enacted. The formers have always considered this piece of legislation as to be unconstitutional; therefore, they have not complied with all of its provisions. As a corollary, the latter has complained that presidents have being consistently not complying with the law. This aspect will be discussed in the next chapter, when the thesis addresses how the legal framework on war powers has performed as a whole.

D. THE NATIONAL SECURITY ACT OF 1947 AND THE EXECUTIVE NATIONAL SECURITY PROCESS

Having the Constitution as the main reference where the principles that applies to war powers can be extracted from, and the War Powers Resolution as the law that intends to regulate the political relationship between the President and the Congress with respect to war powers, what has to be discussed now is the way the executive branch handle national security issues. According to Sam C. Sarkesian, the national security process is a matter reserved mainly to the President, who articulates national security with wide discretion and, therefore, without major reference to Congress or the American people.¹¹⁹ Explaining this statement, Sarkesian argues, "The primary instruments and agencies charged with responsibility of carrying out national security policy are under ... [the president's] control, and Congress and the American people depend primarily on him for information on national security and for defining U.S. national security interests."¹²⁰ This wide discretion, nonetheless, is not absolute. In this matter, Sarkesian points out that the President must deal with several problems associated with the process of developing and implementing national security policy and strategy. Briefly, these problems are: domestic

¹¹⁹ Sam C. Sarkesian, *U.S. National Security: Policymakers, Processes, and Politics* (Boulder, CO: Lynne Rienner Publishers, 1989), 122.

¹²⁰ Ibid.

policy considerations, impact on the administration of national security failures, struggles with the bureaucratic power structure to develop and implement national security policies, and the external environment and constituency of national security policy.¹²¹

These problems, however, have not impeded presidents in carrying out national security policies, and for developing and implementing these policies they have counted on a bureaucratic structure that provides the assets to do so. This structure is the National Security Establishment (see Figure 1¹²²), of which one major component is the National Security Council.

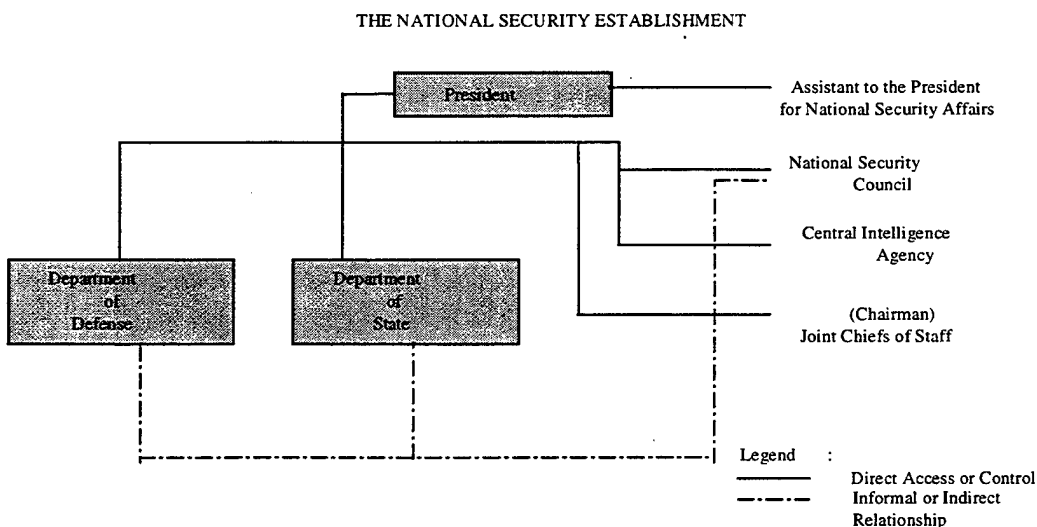


Figure 1. The National Security Establishment.

The National Security Council is politically the most important component of the National Security Establishment. It was created by the National Security Act of 1947 as a major structural effort to provide a high-level advisory body to the President on national security issues.¹²³ The idea of

¹²¹ Ibid., 124.

¹²² Ibid., 81.

¹²³ The National Security Act of 1947 is well known because it provided assets for the unification of the Armed

creating it has many sources, one of which was the American military experience during WWII of working in combined committees with the British, who since 1904, had used the Committee of Imperial Defense as a “means of assuring high-level coordination of national security matters.”¹²⁴ Taking this idea from the British and adapting it to the American political system, the United States created the “Committee of Three,” one of the predecessors of the National Security Council.¹²⁵ The Secretaries of State, War and the Navy formed this committee, which “was designed to facilitate consultation among these presidential advisers on politico-military matters.”¹²⁶

The National Security Act of 1947 created the NSC:

To advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security so as to enable the military services and the other departments and agencies of the Government to cooperate more effectively in matters involving the national security.¹²⁷

According to this mandate and because of its evolution since 1947, the NSC has become the President’s principal forum for addressing national security and foreign policy matters with his senior security advisors and cabinet officials.¹²⁸ Under statutory law, the NSC is composed of the President, who chairs it, the Vice President and the secretaries of State and Defense. The

Forces. Yet it also created a mechanism to coordinate different areas of national security: national security policy, intelligence, and military, industrial and civilian mobilization. The organizations to work on this coordination issues were respectively: the National Security Council (NSC), the Central Intelligence Agency (CIA), and the National Security Resources Board (NSRB), in Subcommittee on National Policy Machinery, *Organizational History of the National Security Council During the Truman and Eisenhower Administrations* (Washington, D.C.: Subcommittee print, 1960), 2.

¹²⁴ Ibid., 1.

¹²⁵ Ibid., 2.

¹²⁶ Ibid.

¹²⁷ *National Security Council*, June 14, 1999 [information on-line]; available from <http://www.whitehouse.gov>; Internet; accessed November 2, 1999.

¹²⁸ Ibid.

Chairman of the Joint Chiefs of Staff acts as the statutory military advisor to the Council, and the Director of Central Intelligence as the intelligence advisor.¹²⁹ In addition, the Secretary of the Treasury, the U.S. Ambassador to the United Nations, the Assistant to the President for National Security Affairs, the Assistant to the President for Economic policy, and the Chief of Staff to the President are invited to all meetings of the Council. Finally, other officials are invited, as appropriate (see Figure 2).^{130 131}

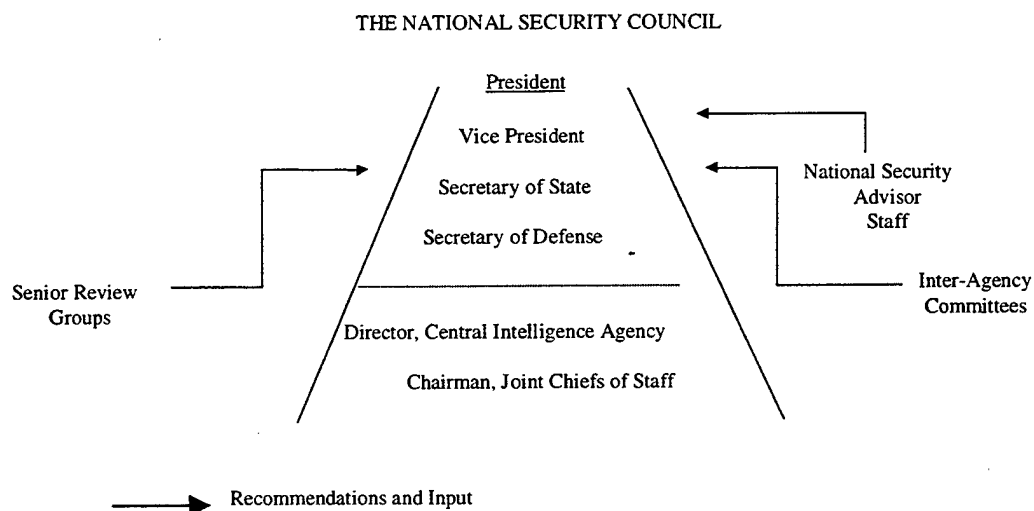


Figure 2. The National Security Council.

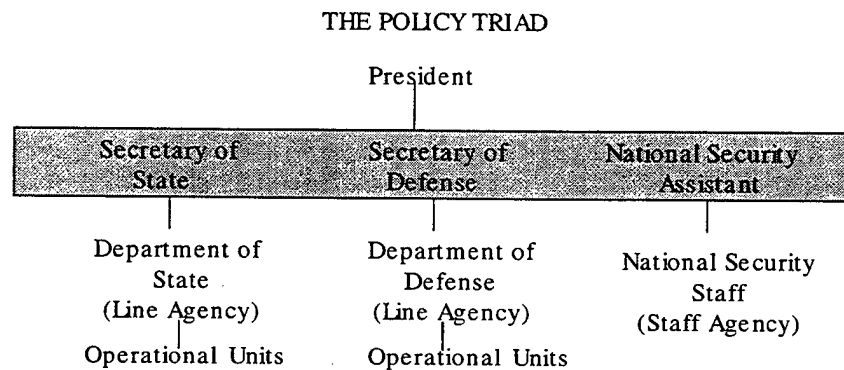
Within the NSC, three figures are called to play a key role in advising the President on National Security Issues: the secretaries of State and Defense, and the Assistant for National Security Affairs. It is on these advisors, conceived by Sam C. Sarkesian as the “policy triad,” that

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Sarkesian, *U.S. National Security: Policymakers, Processes, and Politics*, 64.

the President must rely to come up with decisions on national security issues. Further, as Sarkesian argues, "It is the relative power and relationship of these three...to one another and to the President that is critical to the shape and direction of U.S. national security policy."¹³² Sarkesian summarizes the role, similarities and differences of each of these entities according to the graphic shown in Figure 3¹³³.



The Secretaries of State and Defense each wear two hats: staff advisor to the President and operational departments head. Thus, their perspectives on national security are usually conditioned by the capability of their departments to implement policy and strategy. The National Security Advisor, however, has no operational units; his National Security Staff is just that, a staff agency. The National Security Advisor and his staff attempt to provide a presidential perspective and to stand above department issues. Perceptions, mind-sets, and responsibilities differ between the two Secretaries, and particularly between the two Secretaries and the National Security Advisor.

Figure 3. The Policy Triad.

Resuming, the U.S. Constitution, the War Powers Resolution, and the National Security Act of 1947 constitute the three major legal documents that shape the way in which war powers are created and put into effect. The Constitution creates the principles and grants the powers to each of the branches of federal government to acting pursuit of the national interest. The War Powers Resolution establishes specified rules to which the President must adhere in exercising war

¹³² Ibid., 73.

¹³³ Ibid., 64

powers. Finally, the National Security Act creates the National Security Council as the principal institutional asset to help the President in making the decisions regarding national security.

The National Security Council is regarded as such because by statutory law it is considered to be the institution mandated to gather in one single body the main actors capable to advise the President on national security issues. Further, the way the National Security Council is shaped (see Figure 2) allows that all the information produced by the agencies in charge of seeking it can be directed to this advisory council. By this procedure, there is an assurance that the main advisors on national security (i.e., the Secretaries of State and Defense, and the Assistant for National Security Affairs) would count with all the information they need—at the same time and at the same place—in order to assist the President in these issues. In this regard, is worth asking if it not would be possible to take advantage of this almost unique situation to let other key actors in the use of war powers get more knowledgeable about what is happening in each particular crisis. This aspect will be discussed as the thesis proceeds, because it is considered to be one of the important elements in which the final proposal will rely on.

Having discussed in this chapter the current legal framework on war powers, in the next one the goal is to analyze and evaluate if the Constitution and statutory laws have permitted the government to perform effectively in such matters, specifically with respect to the relationship between the President and Congress.

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IV. IMPLEMENTATION OF THE LEGAL STRUCTURE ON WAR POWERS

A. IMPLEMENTATION OF THE WAR POWERS RESOLUTION

With the War Powers Resolution enacted as a law in 1973, Congress expected to find an expedited way of working with the executive branch of government on war powers issues. Recalling the purpose of this act, Congress' goal had been to "insure that the collective judgment of both the Congress and the President would apply to the introduction of United States Armed Forces into..." war situations. Former Senate Foreign Relations Committee chief of staff Pat Holt wrote in this regard:

It had been [Senator Jacob] Javits's hope that Congress would work out a "methodology," as he called it, for joint presidential action in sending American troops into combat, that the president would sign it, and that the resulting law would then represent a compact between Congress and the President for making the Constitution work in what is generally admitted to be a gray area.¹³⁴

From the very beginning, nonetheless, this expectation was not accomplished, especially when President Nixon vetoed the bill. From that moment up to the present time presidential compliance with the War Powers Resolution has been poor. Every time presidents have decided to deploy U.S. troops in combat situations, they have avoided any reference to specific provisions of the War Powers Resolution that might have bound them to submit their decisions to Congress. Even though the record suggests that in some of these cases presidents might have been acting under its regulations, the reality demonstrates that these have been no more than formal actions, with a lack of real will to comply with the purpose of the act. In this matter, Ellen C. Collier argues that since the passage of the War Powers Resolution presidents have reported to Congress the

¹³⁴ Pat M. Holt, *The War Powers Resolution: The Role of Congress in U.S. Armed Intervention* (Washington, D.C.:

deployment of forces, yet in these reports they systematically have not cited section 4(a)(1), "...indicating that forces have been introduced into hostilities, which would trigger the 60-day limit."¹³⁵ Appendix 1 represents a sample of the presidents' behavior on this matter since the War Powers Resolution became law.

From a legal viewpoint, to some scholars the fact that presidents have not complied with the provisions of the War Powers Resolution as it was envisioned by its framers could be considered absolutely outrageous of presidential behavior. This situation, however, cannot be attributed solely to the executive power. There are several reasons to be pointed out for such presidential behavior, reasons that have their roots in the different and to some extent opposing views that the branches of the federal government hold on the issue. To the executive, the War Powers Resolution is unconstitutional. To Congress, there is the belief that presidents must comply with the law, yet in reality the legislature has not taken any effective measure to enforce such compliance. Finally, to the judiciary, the dispute that arises between presidents and Congress is viewed as a political issue, therefore, non-justiciable.

1. The Executive's Argument: Unconstitutionality of the War Powers Resolution

According to John Norton Moore, "no American president has accepted the restrictive vision of presidential authority embodied in this resolution. It represents, quite simply, a congressional view of the war powers."¹³⁶ Further, Moore argues that the War Powers Resolution

American Enterprise Institute, 1978), 1-2.

¹³⁵ Ellen C. Collier, "Statutory Constraints: The War Powers Resolution," in *The U.S. Constitution and the Power To Go to War*, ed. Gary M. Stern and Morton H. Halpeim, 55-82 (Westport, CT: Greenwood Press, 1994), 55.

¹³⁶ John Norton Moore, "The War Power Resolution: A Debate between Professor John Norton Moore and Frederick S. Tipson", in *National Security Law*, ed. John Norton Moore, Frederick S. Tipson, and Robert F. Turner, 836-837 (Durham, NC: Carolina Academic Press, 1990), 836.

contains three significant problems.¹³⁷ First, it embodies a myth, which consists in thinking that the resolution would have prevented the Vietnam War. Second, the resolution is unconstitutional. Third, the resolution creates a potential confrontation between the president and Congress in the middle of a crisis, when the nation can least afford it.

Of these three problems raised by Moore, certainly the most relevant is the unconstitutionality of the resolution. It is relevant because this is the main reason that presidents have raised for not invoking the War Powers Resolution.¹³⁸ In fact, the resolution was considered unconstitutional from the moment it was presented for presidential signature. President Nixon justified his veto of it by claiming that its provisions “would attempt to take away, by a mere legislative act, authorities that the President has properly exercised under the Constitution for almost 200 years.”¹³⁹ Further, President Nixon specifically rejected on constitutional grounds section 5(b), requiring the President to withdraw U.S. forces from hostilities within 60 days unless Congress grants authorization, and 5(c), requiring withdrawal of forces if Congress mandates it by concurrent resolution.¹⁴⁰ What President Nixon found most unacceptable was the fact that without any congressional action, his presidential powers as commander-in-chief would end automatically.¹⁴¹ In this matter President Nixon’s argument was that Congress was “...attempting to increase its policy-making role through a provision which requires it to take absolutely no action

¹³⁷ Ibid.

¹³⁸ According to Michael Foley and John E. Owens, “President Nixon Vetoed the legislation stating that it was unconstitutional as it took away ‘authorities which the president had properly exercised under the Constitution for almost 200 years,’ ” in Michael Foley and John E. Owens, *Congress and the Presidency: Institutional Politics in a Separated System* (Manchester: Manchester University Press, 1996), 353.

¹³⁹ Gerald Gunther and Kathleen M. Sullivan, *Constitutional Law*, 13th ed. (Westbury, N.Y.: The Foundation Press, 1997), 373.

¹⁴⁰ Ibid.

at all. [O]ne cannot become a responsible partner unless one is prepared to take responsible action.”¹⁴²

Supporting the president's argument on this issue, Moore points out that if Congress wants to define the war powers of Congress and those of the president, the mechanism for doing so must be a constitutional amendment, since “...the constitutional scheme of separation of powers cannot be altered by one branch....”¹⁴³ Moore offers two arguments against the constitutionality of the War Powers Resolution¹⁴⁴. The first is that through the War Powers Resolution Congress cannot deny “...presidential authority to use the armed forces abroad in a setting short of war.”¹⁴⁵ Second, Moore brings into account the Supreme Court decision in *I.N.S. (Immigration and Naturalization Service) v. Chadha*, in which the legislative veto was struck down because of its lack of constitutionality.¹⁴⁶ The Supreme Court ruled that the legislative veto in the Immigration Act violated the requirement of Article I of the Constitution that all legislation be passed by both houses and presented to the President for his signature.¹⁴⁷ Regarding the Supreme Court's decision on this case, Moore affirms, “...striking down the legislative veto [in *I.N.S. v. Chadha*], [the Supreme

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Moore, “The War Power Resolution: A Debate between Professor John Norton Moore and Frederick S. Tipson”, 837.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ Citing Martin Wald, “Chadha was an East Indian with a British passport whose student visa had expired and who faced deportation. An INS hearing officer decided (on behalf of the Attorney General) that Chadha met the criteria of the Immigration Act and suspended his deportation, but the House of Representatives passed a resolution disapproving the suspension, in Wald, *The Future of the War Power Resolution*, 27.

¹⁴⁷ Ibid.

Court] invalidates the legislative veto in Section 5(c) of the resolution..., "¹⁴⁸ since Congress made this provision unconstitutional when it decided to use a concurrent resolution—which does not require the president's signature—as a way to remove United States Armed Forces engaged in hostilities.

Robert F. Turner also supports the lack of constitutionality.¹⁴⁹ Turner argues that the Resolution in section 2(c) appears to limit by statutory law the constitutional powers of the President as commander-in-chief, (i.e., declaration of war, specific statutory authorization, or a national emergency created by attack upon the United States, its territories, or its armed forces). The process of "consultation" established in Section 3 of the resolution Turner asserts to be unconstitutional due to the intention of directing the President "...to consult about sensitive matters confided by the Constitution to his discretion...."¹⁵⁰ The resolution also fails of constitutionality when, in Section 4, it seeks to "...compel the President to provide meaningful 'reports' about ongoing hostilities."¹⁵¹ Further, Turner questions in Section 5 the need of Congress to authorize the presence of U.S. forces within 60 (or 90) days of the initial commitment, even though these forces are deployed for defensive purposes.¹⁵²

The way the Constitution was designed to work is clear. If the President decides that the national interest require commencing a "war" against another State, he must obtain the approval of both the House and the Senate in advancing of initiating such a conflict. Like other exceptions to the President's "Executive"

¹⁴⁸ Moore, "The War Power Resolution: A Debate between Professor John Norton Moore and Frederick S. Tipson," 837.

¹⁴⁹ Robert E. Turner, "The War Powers After 200 Years: Congress and the President at a Constitutional Impasse," in *National Security Law*, 840.

¹⁵⁰ *Ibid.*, 841.

¹⁵¹ *Ibid.*, 842.

¹⁵² *Ibid.*, 843.

powers, the power “to declare war” was intended to be construed narrowly. It gives Congress a “veto” over a presidential decision to launch an offensive “war,” but it does not empower you to seize control of the President’s independent constitutional powers on the theory that the President’s management of military deployments might lead another State to commit aggression against the United States.¹⁵³

Nevertheless, not all scholars’ judgments agree on the unconstitutionality of the War Powers Resolution. Frederick S. Tipson argues its constitutionality given the fact that “...Congress should have the central role in decisions to go to war, so long as the President retained—in James Madison’s words—‘the power to repel sudden attacks.’”¹⁵⁴ Tipson rejects the application of the Supreme Court’s *Chadha* decision to foreign affairs issues based on the fact that “...the relationship between presidential and congressional authority is different in foreign and domestic affairs.”¹⁵⁵ Tipson states,

If this difference applies to foreign affairs generally, it is especially true in the war powers area, where Congress is generally presumed to be unable to delegate at all. At a minimum, the court should distinguish the “statutory” use in areas of shared authority like war powers. It would be highly unwise for the court to deny to the political branches the best available mechanism to exercise their joint responsibilities.¹⁵⁶

Regarding the ability of Congress to require the President to act due to congressional inaction within 60 days, Tipson asserts its constitutionality, arguing, “...this situation is not likely to arise....[I]n most cases, Congress can be expected to act affirmatively, either to authorize...or to direct its termination....[I]n other words, the constitutionality of section 5(b) may depend on the

¹⁵³ Ibid.

¹⁵⁴ Frederick S. Tipson, “The War Power Resolution: A Debate between Professor John Norton Moore and Frederick S. Tipson, in *National Security Law*, 838.

¹⁵⁵ Ibid., 839.

¹⁵⁶ Ibid.

circumstances in which it comes into play—if ever.”¹⁵⁷ Responding to the question whether this resolution is enforceable, Tipson assigns to the Supreme Court the task of resolving a potential confrontation between the president and the Congress. If this is not possible because “...the Court is unwilling to do so...Congress would have little choice but to enforce its position through the funding process.”¹⁵⁸

2. The Judiciary’s Argument: Lack of Justiciability

Tipson’s statement about the potential unwillingness of the judicial branch of government to resolve real disputes over war powers between the president and Congress leads to the second reason explaining presidential behavior. Is the judicial branch willing to intervene in this dispute? The facts show that it is not. On the contrary, it prefers to leave the conflict in the hands of the President and the Congress. The argument used by the courts for taking this option is the “political question doctrine.”

As was discussed in Chapter II, *Marbury v. Madison* set up the doctrine that the judiciary has the power of judicial review, that is, the power to examine constitutional claims. This power, nonetheless, is bound by what is technically called the “constitutional and prudential limits on constitutional adjudication.”¹⁵⁹ This concept means that, because each court is a judicial body deciding cases, it has become relevant to the judiciary to delineate what constitutes a “case” appropriate for judicial resolution.¹⁶⁰ For defining the scope of a “case” the courts have come up with a method in which three main questions have to be answered. First, who may go to court?

¹⁵⁷ Ibid., 840.

¹⁵⁸ Ibid.

¹⁵⁹ Gunther and Sullivan, *Constitutional Law*, 27.

¹⁶⁰ Ibid.

This refers to the *standing* issue, which depends on the personal interests that a person might have to trigger a judicial response. Second, when is the dispute *ripe* enough to elicit a judicial resolution? Third, what constitutes a constitutional issue to be *justiciable*—i.e., suitable for judicial decision? The last of these three questions raises the political question doctrine, which states that some disputes, so-called political questions, “...are inappropriate for judicial resolutions and are therefore nonjusticiable.”¹⁶¹ In this matter, it is said:

[T]he political question doctrine rests on a blend of themes, in part reflecting normal constitutional interpretation and in part resting on prudential considerations that counsel against rulings that might generate excessive conflicts with the other branches. The basic doctrine that some constitutional issues are “political” and thus nonjusticiable is well established; what the proper ingredients of that concept are has produced considerable uncertainty and controversy.¹⁶²

The controversy over the political question doctrine arises mainly on academic grounds. To some scholars, the framers sought to commit to one institution the constitutional task of solving struggles originating in controversies between the executive and the Congress, granting this authority in the Constitution to the judicial branch of government. In this vein, Article III, Section 2 states, “The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution....”¹⁶³ According to Herman Pritchett, the authority to decide cases or controversies “...includes the right to interpret constitutional powers and limitations and to announce and enforce constitutional limitations on the Executive and Congress.”¹⁶⁴ About the necessity of the Supreme Court’s interpreting the Constitution, Gasper argues that

¹⁶¹ Ibid., 45.

¹⁶² Ibid., 46.

¹⁶³ Congressional Research Library of Congress, *The Constitution of the United States of America: Analysis and Interpretation*, 15.

¹⁶⁴ Herman C. Pritchett, “National Security and the United States Judiciary,” in *The Constitution and National*

...the Constitution has meaning and that we must therefore understand and state it with as much fidelity as is humanly possible. It would, of course, be unsound to ignore the historical fact that the Constitution has been adapted by Supreme Court interpretation and governmental practices to meet changing needs. Yet the fact of change does not mean that "anything goes" and fidelity to the framers' Constitution is not an all-or-nothing affair.¹⁶⁵

According to this constitutional interpretation, the judicial branch should be committed to this constitutional assignment. Nevertheless, in practice, when the president's authority has been challenged in the courts, the latter have been reluctant to review presidential decisions in the area of military and foreign affairs, stating that these decisions are unreviewable by the judiciary.¹⁶⁶ In other words, "a political question creates a non-justiciable controversy, to be resolved through the political process, not by the courts."¹⁶⁷ According to many scholars, nonetheless, by using the political question doctrine courts have shied away from the merits of war power cases, abdicating "...their role in our constitutional system of checks-and-balances and unwittingly have contributed to the emergence of an imperial presidency."¹⁶⁸

Are these scholars right when they make such statements? Are there other reasons that lead the judiciary to use the political question doctrine in both foreign affairs and defense issues? Michael Foley and John E. Owens explain the political question doctrine through the idea that the Supreme Court, in regulating the flow of cases into its dockets, develops "a series of conventions that guides the selection of cases and massively reduces the number accepted for judgement."¹⁶⁹

Security, 317.

¹⁶⁵ Casper, *Separating Power: Essays on the Founding Period*, 4.

¹⁶⁶ "The Political Question Doctrine," in *National Security Law*, 865.

¹⁶⁷ Linda Champlin and Alan Schwarz, *Political Question Doctrine and Allocation of the Foreign Affairs Powers*, 134.

¹⁶⁸ John Yoo, *The Continuation of Politics by Other Means*, 32.

¹⁶⁹ Foley and Owens, *Congress and the Presidency: Institutional Politics in a Separated System*, 351.

In rejecting cases the Supreme Court, making a “political judgement...refuses to hear them on grounds that they fall outside the criteria for judicial decisions....[I]mplicit in such declarations is the assertion that some cases simply do not lend themselves to adjudication—i.e., that there are some controversies which raise matters *beyond* the reach of the Constitution as a body of fundamental and determinate law.”¹⁷⁰ Foley and Owens particularly stress disputes in foreign policy and national security, which the Supreme Court has categorized as “political questions’ and, therefore, non-justiciable in character.”¹⁷¹ Furthermore, according to these scholars, the Supreme Court argues that “each branch has its own resources available to protect and assert its interests.”¹⁷²

So far, according to the Supreme Court’s decisions, the political question doctrine is based on the assumption that certain subjects are “non-justiciable in character.” Linda Champlin and Alan Schwarz, nonetheless, disagree with this statement, asserting that with these decisions the Judiciary has chosen the “hands-off approach.”¹⁷³ These scholars assert that a “true political question doctrine...is not a subset of non-justiciability, but rather a particular type of merit determination.”¹⁷⁴ Champlin and Schwarz argue that instead of declaring whether a political decision is constitutional, the courts should assume its constitutionality when there is powerful political reason for doing so, which leads to the argument of finality. Under this argument, “In the true political question, the court assumes rather than determines validity for reason external to the

¹⁷⁰ Ibid.

¹⁷¹ Ibid., 353.

¹⁷² Ibid.

¹⁷³ Champlin and Schwarz, *Political Question Doctrine and Allocation of the Foreign Affairs Powers*, 119.

¹⁷⁴ Ibid., 134.

validity of the political action taken, such as an overwhelming need for finality exists.¹⁷⁵ Delving into this topic, Champlin and Schwarz argue that the political question doctrine "...properly construed, has only one application: Judicial protection of a coordinate branch decision, which may or may not be constitutional, where the value of creating finality for that decision is more important than its constitutionality."¹⁷⁶

Champlin and Schwarz definitely disagree with the application of the political question doctrine to disputes over allocation of powers, which ought to be considered as an internal affair. These scholars build their argument on a distinction between cases where finality is important (only in foreign affairs), in which they say the political question doctrine may be applied, and cases in which the courts must resolve to which branch the power should be allocated. They point out three reasons for this distinction:

First, because the finality value will not ordinarily be implicated in any dispute....Second, even where finality is important, a merit determination will allow the legitimate powerholder to determine its importance and act accordingly. Finally, it would be impossible, in any event, to apply the doctrine to an allocation dispute. The heart of the doctrine is its assumption of constitutionality where unified, governmental wrongful exercise is in question; it is not possible where the sole issue is which one of two inconsistent actions was valid. To assume the constitutionality of two inconsistent actions is to create an anomaly that has no place in constitutional adjudication.¹⁷⁷

Why has the judicial branch decided to treat the allocation claims as a political question?

As has been mentioned, there are scholars' opinions that the courts have misunderstood and misused the political question doctrine because of their particular interpretation of non-justiciability. But there are also others factors involved. There is the perception that the judiciary is reluctant to

¹⁷⁵ Ibid.

¹⁷⁶ Ibid., 121.

¹⁷⁷ Ibid., 152.

intervene because of political factors. As Michael Foley and John E. Owens point out, among several reasons for this perception there are two labeled as political:

...a basic unwillingness to assume an explicitly judgemental role over two branches that are ostensibly equal in status to the judiciary...[and] an understanding that political contestants will attempt to use the courts to translate political differences into demarcation disputes over the separation of powers and to substitute judicial rulings for political decisions or non-decisions.¹⁷⁸

Taking into consideration the current meaning that the judiciary gives to the political question doctrine, it is unlikely that a solution to the dispute between the President and the Congress will come through judicial decisions. This assessment does not mean that in the future the courts will not change this view, dismissing the political question doctrine with respect to war powers, and thus ruling in favor either of either the presidential or the congressional argument. In fact, as will be mentioned below, there is one case in which this has happened. Nonetheless, this shift has not come to be a real possibility in most cases. For that reason, the thesis will not pursue the judicial solution of the dispute. Rather, it will concentrate its effort on finding a political solution, through which both the President and the Congress could work together on a permanent basis.

3. The Legislative Argument: Presidents Must Comply with the Law

Despite Congress appearing to demand presidential compliance with the War Powers Resolution, the fact is that, as a body, it has never challenged the presidential authority to deploy U.S. military forces in foreign crises without congressional authorization.

In the courts, what history shows is that only isolated legislators, or at the most groups of them, have challenged such authority by filing lawsuits against the President. In fact, Congress has never pursued any coordinated action to strike down presidential decisions to send U. S.

¹⁷⁸ Foley and Owens, *Congress and the Presidency: Institutional Politics in a Separated System*, 353.

troops overseas because of foreign hostilities. Perhaps one of the most relevant legal initiatives ever taken by members of Congress was the lawsuit filed by 54 members of Congress against President Bush in 1990,¹⁷⁹ after he doubled the number of troops in Saudi Arabia in August of that year. In their suit the legislators urged the district court "to grant an injunction to block President Bush from launching a military attack without Congress' approval."¹⁸⁰ Surprisingly, U.S. District Judge Harold H. Greene, even though he rejected the injunction requested, did not dismiss the case based upon the "political question doctrine."¹⁸¹ On the contrary, even though he declared that the case was unripe,¹⁸² he gave Congress a free hand to pursue a favorable judicial decision when he ruled that the injunction might be accepted "...only if a majority of the Congress seeks relief from an infringement on its constitutional war-declaration power...."¹⁸³ Yet Congress did not file a lawsuit against President Bush. On the contrary, up until Congress authorized the use of force against Iraq, in January 1991, the legislature never showed any serious inclination to demand that the administration invoke the War Powers Resolution.¹⁸⁴

In exercising the power of the purse Congress has also failed. According to Louis Fisher, in challenging presidential authority Congress has not acted "...in the areas of war and spending

¹⁷⁹ *Dellum v. Bush*, 752 F.Supp. 1141 (D.D.C. 1990).

¹⁸⁰ Joan Biskupic, "Members Argue Suit Over War Powers," *Congressional Quarterly Weekly Report* 48, no. 49 (1990): 4084.

¹⁸¹ According to Harold Hongju Koh, *Dellum* represents a milestone in the struggle over war powers between the President and Congress. It is so because after Judge Greene's decision "we will not likely hear our President again claim such a broad inherent constitutional authority to commit U.S. forces to such a large scale, premeditated, potentially sustained war." See Harold Hongju Koh, "Judicial Constraints: The Courts and War Powers," in *The U.S. Constitution and the Power to Go to War*, 128.

¹⁸² Based on the constitutional and prudential limitations on constitutional adjudication, discussed above.

¹⁸³ Michael J. Glennon, "The Gulf War and the Constitution," *Foreign Affairs* 70, no. 2 (1991): 95.

¹⁸⁴ Carol J. Doherty, "Consultation on the Gulf Crisis is Hit-or-miss for Congress," *Congressional Quarterly Report* 48, no. 41 (1991): 3440.

powers with confidence or institutional courage.”¹⁸⁵ Basing his argument on constitutional grounds Fisher affirms that the framers of the Constitution relied for the safety of the nation primarily on Congress.¹⁸⁶ Yet so far members of Congress have not responded properly to this constitutional obligation. Instead, in Fisher’s view, they have let presidents act in a way that discards the principles of separation of powers and checks and balances. To explain congressional behavior in this matter, Fisher points out the self-protective approach Congress has taken to spending on defense issues. Under this approach, Fisher affirms, “...members of Congress...protect themselves. Rather than opposing the President on a potential military action, they find it more convenient to acquiesce and avoid criticism that they obstructed a necessary mission.”¹⁸⁷

What could be the reasons for such inconsistent congressional performance? The first reason might be the underlying idea of protecting Congress—i.e., members of Congress—from the possibility of making wrong decisions. In this vein, what might be happening is that politically this body assesses favorably the convenience of the status quo. In this way members of Congress maintain the freedom of action to criticize the President for his decisions if they are wrong, without being accountable for them, and to share the glory if his decisions are successful. Yet there might be another reason for this congressional behavior, and this would be the profound belief among members of Congress that, despite constitutional constraints, the President ought to have a free hand in dealing with war issues. Even though Fisher still links this congressional “free hand” policy to the idea of protecting Congress and its members from eventual failures, the facts that he points out also suggest the possibility of a bipartisan support for the President on war issues. This might

¹⁸⁵ Louis Fisher, *Congressional Abdication: War and Spending Powers* (Saint Louis University Law Journal, Summer 1999), 1004; available [Online]: LEXISNEXIS/ LAWREV/ALLREV/ (Congress and the Power of the Purse and War Powers), [November 18, 1999].

¹⁸⁶ Ibid.

¹⁸⁷ Ibid., 1005.

explain the Republican support for President Clinton's policy of sending U.S. military personnel to Bosnia in 1995. In this situation, Senate Majority Leader Bob Dole said, "In my view the President has the authority and the power under the Constitution to do what he feels should be done regardless of what Congress does."¹⁸⁸ Senator John McCain also was a strong supporter to President Clinton's policy over Bosnia, disregarding congressional authority, when he stated, "The President will be sending 20,000 Americans to Bosnia for 1 year, whether [the Senate] approve or disapprove.... The President has the authority under the Constitution to do so, and he intends to exercise that authority with or without the approval."¹⁸⁹

Arguments that show Congress unwilling to challenge presidential decisions on war powers must not be seen as facts from which one may conclude that the executive has "free hand" on this issue. In this vein, if Congress has not challenged the President up to this moment, nobody could reasonably argue that this is a trend that will continue in the future. Therefore, the finding of a political solution to the presidential-congressional dispute over war powers still stands as necessary.

B. IMPLEMENTATION OF THE EXECUTIVE NATIONAL SECURITY PROCESS

As was discussed in Chapter III, the executive national security process constitutes the procedure through which the United States can assess situations regarding national security. The outcome of this process is to allow top officials in this area to provide efficient advice to the President who, acting as commander-in-chief, must make the final decision on each critical issue. It was also explained that institutionally this process is reflected in the National Security Establishment, which has as its main advisory body the National Security Council. It is supposedly

¹⁸⁸ Ibid., 977.

the National Security Council that prepares the President before he decides whether to send U.S. military forces into critical foreign situations.

How does this process work? Is there any statutory law that establishes the way the President must proceed in this matter? The answer is that there is not. In fact, there is a consensus among scholars that presidents have no statutory mandate or previous political standards that binds them to build a relationship with the NSC or the way to establish working procedures that might allow the NSC to fulfill its advisory role. In this matter, Sam C. Sarkesian argues that “the President determines how the NSC is used—or even whether it should be used. Each President from Truman to the present has shaped the NSC and used it according to his own perceptions of office and leadership.”¹⁹⁰

This fact might have both positive and negative consequences. On the positive side, it would permit to the President enough flexibility to shape the NSC according to the way he thinks it should work to achieve its goals. This flexibility might be well used, for example, to reorganize the NSC in order to incorporate a broader scope of advisors that the President might think necessary in addition to statutory members and statutory advisers. On the negative side, this flexibility might lead the President to act on national security issues in a way that would contradict the intention that the framers of the NSC had in mind when they created it. As an example, the President could simply not use—or misuse—the NSC, making important decisions on national security without being obliged to require its advice.

One of the cases that reveals the misuse of the NSC is the Iranian crisis. One of the milestones of this crisis was the failed attempt to rescue the American hostages in Iran in April

¹⁸⁹ Ibid.

¹⁹⁰ Sarkesian, *U.S. National Security: Policymakers, Processes, and Politics*, 81.

1980, the so-called Operation Eagle Claw. Because of the lack of statutory regulations that would define the way the NSC carries out its advisory role, there was no way to avoid or even to minimize the evident animosity between the NSC and the Department of State. According to John Prados,

There was no constellation of forces in Washington that could have prevented the Iranian revolution, but a different one might have read the signs better, acted sooner, been more successful with the Islamic successor government, and averted the hostage crisis. At a critical moment, the NSC-State Department competition weakened the United States government's ability to discern a course of action on Iran.¹⁹¹

One of the most remarkable facts in this crisis was the presidential approval to launch the rescue operation, which was taken in a critical NSC meeting in the absence of Secretary of State Cyrus Vance, a strong opponent of this mission. The absence of Secretary of State Vance from this meeting resulted in a low-profile role for the State Department, since its representative, Warren Christopher, although aware of Vance's opposition to the rescue mission, withheld the Department of State's position in the discussion,¹⁹² thus facilitating President Carter's decision to launch the mission.

Despite the struggle for power that seems unavoidable in every structure that includes powerful political institutions, each one with clear and conflicting self interests, what seems to be a critical issue is the lack of legal regulations to diminish at its maximum level the negative consequences of this conflict. Furthermore, regardless of the existence of statutory regulations that intend to limit the presidential authority to deploy U.S. military troops—i.e., the War Powers Resolution—what is cause for concern is the possibility of a president's possessing the legal authority to make war decisions without being bound to receive proper and formal advice.

¹⁹¹ John Prados, *Keepers of the Eyes: A History of the National Security Council from Truman to Bush* (New York, NY: William Morrow and Company, 1991), 434.

Acknowledging the fact that presidents are politically accountable to the American public when decisions on war powers lead to failure, it seems that this personal or partisan political cost does not avoid the negative impact of these decisions for the country. Thus, what seems wise is to minimize the risks of presidents making decisions without receiving this proper and formal advice.

C. FINDING SOLUTIONS: THE CONSULTATION PROCESS

Given what has been discussed in this chapter, and regardless of the purposes of the War Powers Resolution, it seems that the current situation regarding war powers remains a political struggle. Summing up, while presidents argue their constitutional rights as commander-in-chief to decide the deployment of U.S. military forces without congressional approval, Congress does not recognize this presidential authority, basing its arguments on both constitutional and statutory grounds. Congress' position, however, is very weak because of the lack of congressional willingness to challenge this presidential authority effectively. Complementing this dispute, the federal courts so far appear to have found enough arguments to apply the political question doctrine to this quarrel, thus dismissing the cases.

In this regard, it seems that one probable reason why efforts to make the war powers more workable have failed is that these have been targeted in the wrong direction. So far, these efforts have been focussed on regulating what the President must do after he makes a war powers decision, instead of looking to a closer and more friendly presidential-congressional relationship on war powers before such a decision is made. This appears to be the problem with the War Powers Resolution. In this matter, it seems that members of Congress at the time this act was discussed concentrated their attention mainly on two crucial aspects: first, on obligating the President to report the deployment of forces once the presidential decision has already been made; second, on

¹⁹² Ibid, 443.

calling for the ending of this deployment if in Congress' opinion there is no reason for such deployment. In pursuing these two goals, the War Powers Resolution set forth in Section 5 detailed provisions mandating how both the reporting and withdrawing of military forces ought to work. In contrast, the consulting aspect of the Resolution, a phase considered mainly to be held before introducing United States armed forces into hostilities, was only vaguely mentioned and explained in Section 3 of the Resolution

Since the War Powers Resolution pays more attention to the events that come after the troops are deployed, it is expected to have as outcomes political conflicts between the President and Congress. On the one hand, how is it possible to conceive an amicable solution when Congress feels that its constitutional power to declare war is being clearly challenged by the President? On the other hand, how can the President allow Congress to intervene in foreign policy decisions that he has already made under what he considers his executive powers? Given this scenario the struggle is almost guaranteed.

Hence, any solution to this dispute must rest on a different basis. This basis is that both the President and Congress ought to have permanent working relations during the period in which a potential crisis begins to emerge, and that these should continue until the crisis is over. The main goal of such a solution is to make sure that the President and members of Congress possess almost the same knowledge related to every important aspect of the situation. By this means, the decisions to be made by the former might be supported by the latter, knowing legislators exactly what the reasons for specific presidential decisions are.

Among the aspects of each crisis that legislators should know and identify very clearly is the national interest at stake. This understanding makes a big difference for congressional support of presidents' decisions regarding foreign affairs issues, particularly at the present time, when the

national interest has become less easy to identify than it was in an environment of more traditional warfare. According to James Terry, the introduction of peace operations under the umbrella of the United Nations as a way to interact militarily in the international arena poses serious difficulties for the internal decision making process as it assesses the reasons why the United States should commit forces in particular situations.¹⁹³ Comparing different conflicts in which the United States has committed such forces, Terry affirms:

Unlike Operation Desert Storm, which directly implicated the United States' vital interest, the operations in Somalia, Haiti, and Bosnia were predicated solely upon UN calls for assistance....In this way, Desert Storm embraced the old criterion for military intervention—the defense of national interest—while Somalia, Haiti, and Bosnia incorporated a new set of criteria—the promotion of stability and the thwarting of aggression.¹⁹⁴

According to Terry, this previously unknown environment has had two consequences that have significantly affected the political aspect of the internal decision making process: increased U.N. demands for U.S. participation in U.N. peace operations, and congressional reluctance to commit U.S. forces in this type of crisis.¹⁹⁵ This congressional reluctance might mainly arise from the fact the members of Congress simply do not know what reasons the President has for sending military forces into foreign hostilities, particularly what the national interest is at stake. Thus, what is needed is to make Congress more knowledgeable on each particular crisis. Among the likely strategies to accomplish this purpose, one is to strengthen the consultation process provided by the War Powers Resolution.

¹⁹³ James P. Terry, *The Criteria for Intervention: An Evaluation of U.S. Military Policy in UN Operations*, 102 (winter, 1996), available [Online]: LEXUSNEXIS/LAWREV/ALLREV/ (Haiti and US Policy and War Powers and Congress and Uphold Democracy), [August 16, 1999].

¹⁹⁴ Ibid.

¹⁹⁵ Ibid., 102-108.

The idea of strengthening the consultation process arises from the constitutional shared powers principle, by which the branches of government do not act in isolation from one another in exercising their powers. The Constitution, however, does not define how this shared powers doctrine should be implemented. For this reason, implementation has proceeded in the way that the political and legal system has decided to work it out. In the matter of war powers, it appears clear that the War Powers Resolution has reserved the implementation of the shared powers doctrine for the moment after the President sends U.S. troops abroad and not before, thus diminishing the consultation process. In addition, presidents have contributed to the diminution of the consultation process by simply not putting it into effect. In fact, history shows a very poor record of presidents' consulting Congress. In this matter, Donald L. Westerfield cites Cyrus Vance, Secretary of State between 1977 and 1980, in remarking that between 1973 and 1987, presidents reported 10 military actions to Congress, and that "...in none of these cases did the president adequately consult with Congress prior to the introduction of armed forces into hostilities."¹⁹⁶ Under this *ex-post* method of applying the shared powers doctrine, the result is a framework of disputes, misunderstandings, and struggles for power. In addition, as Edward Keynes points out, "...the distinction between defensive and offensive warfare has eroded, [therefore] the twilight zone of concurrent authority has expanded, the zones of exclusive legislative and executive authority have become less distinguishable, and the boundaries between congressional and presidential power have become more difficult to locate."¹⁹⁷ If Keynes is right, what may be expected in the future is the increasing of political disputes between the President and Congress regarding war powers, which could end in a constitutional crisis between the branches of government.

¹⁹⁶ Westerfield, *War Powers: The President, the Congress, and the Question of War*, 102.

In preventing such a crisis, presidents must learn how to work under an *ex-ante* policy, that is to say, seeking agreements on how to unite with Congress in the face of international crises that suggest the military involvement of the United States. This unity could be achieved under what Louis Fisher calls the "need for comity."¹⁹⁸ In this matter Fisher cites Henry Kissinger, who at the conclusion of the Vietnam War stated:

Comity between the executive and legislative branches is the only possible basis for national action. The decade-long struggle in this country over executive dominance in foreign affairs is over. The recognition that the Congress is a coequal branch of government is the dominant fact of national politics today. The executive accepts that the Congress must have both the sense and the reality of participation: foreign policy must be a shared enterprise.¹⁹⁹

Under this comity approach, the President would be able to gain Congress' support in implementing his foreign policy with respect to war powers, thus making the legislature more a partner than a competitor in a dispute over which branch of government prevails in a political struggle. In order to build this partnership, as has been mentioned, a key idea to take into consideration is that of making Congress more knowledgeable and agreeable to the national interest pursued by the administration in each case. To do so the President ought to strengthen the consultation process, making Congress a participant in the executive decision making process on a more regular basis. If this does not happen and thus Congress simply either does not understand or does not agree on the national interest at stake, presidents always will have to expect opposition from Congress.

¹⁹⁷ Keynes, *Undeclared War: Twilight Zone of Constitutional Power*, 5.

¹⁹⁸ Fisher, *The Politics of Shared Power: Congress and the Executive*, 173.

¹⁹⁹ U.S. Department of State, *Department of State Bulletin*, No 1871, 72 (May 5, 1975), 562. In Fisher, *The Politics of Shared Power: Congress and the Executive*, 173.

The following chapter of the thesis addresses two case studies in which it is possible to analyze the different outcomes of this struggle for power depending on how the consultation process is managed and how well the national interest pursued by the administration is understood. These case studies are the Persian Gulf War of 1990-1991 and the U.S. intervention in Haiti in 1994.

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V. THE CONSULTATION PROCESS: CASE STUDIES ON THE GULF WAR AND THE HAITIAN CRISIS

A. INTRODUCTION

As was advanced in Chapter IV, what seems to be one of the major problems regarding the implementation of the War Powers Resolution has to do with emphasis set forth in the War Powers Resolution on both the presidential reports and congressional termination of military action instead of the consultation aspect of it. In addition, this dispute is unlikely to be resolved by the judiciary because of the political question doctrine.

Because the purpose of this thesis is to find solutions to this political struggle, the present stage suggests a search for other alternatives, one of which might be to strengthen the consultation process contemplated by the War Powers Resolution. This consultation process could enable the President and Congress to agree on what is the national interest in each particular crisis, easing the domestic consequences of the decision that the White House would have to make afterwards, whether this decision led to a deployment of troops or not.

A more consultative framework, nonetheless, has not been on presidents' agendas. In this regard, among others, there are two cases that illuminate the lack of presidential interest in building a constructive relationship with Congress over war powers: the Persian Gulf War and the Haitian crisis.

B. CASE STUDIES: THE PERSIAN GULF WAR AND THE HAITIAN CRISIS

1. The Persian Gulf War

Immediately after Saddam Hussein invaded Kuwait on August 2, 1990, President Bush took both economic and military actions to force Saddam to reverse his action. Economically, Bush issued an executive order blocking Iraqi access to assets in the United States and prohibiting

trade with Iraq.²⁰⁰ Militarily, by August 8, 1990, Bush decided to deploy U.S. troops to protect Saudi Arabia from Saddam's attempts to invade that country.²⁰¹ In spite of President Bush's failure to consult with Congress before taking these measures,²⁰² both the House and the Senate nevertheless backed up these presidential decisions.²⁰³ While the former passed an economic sanctions bill (HR 5431) writing the executive order into law, the latter endorsed it, though did not put it in statutory form (S Res 318).²⁰⁴ The Senate's resolution also urged the president to use diplomatic assets to face the crisis, even though it acknowledged the potential use of a multilateral military effort to maintain or restore stability in the region.²⁰⁵ Congressional support, however, did not mean that lawmakers were not concerned about the development of the crisis; in fact, from the beginning they were thinking about invoking the War Powers Resolution if U.S. troops continued to be deployed.

Conversely, this did not concern President Bush, who on August 10 explicitly reported to Congress that, "...while the forces sent to Saudi Arabia are 'equipped for combat, their mission is

²⁰⁰ Carroll J. Doherty, "Congress Worried About Oil, Threat to Saudi Arabia," *Congressional Quarterly Weekly Report* 48, no. 31 (1990): 2533.

²⁰¹ By September 6 the United States had deployed more than 1000,000 troops to Saudi Arabia, the Persian Gulf, and the Red Sea, in Carroll J. Doherty, "Hill Support Remains Firm, but Questions Surface," *Congressional Quarterly Weekly Report* 48, no. 36 (1990): 2838.

²⁰² Eileen Burgin, *Rethinking the Role of the War Powers Resolution: Congress and the Persian Gulf War* (1995), 24; available [Online]: LEXUSNEXIS/LAWREV/ALLREV/ (Persian Gulf War and President and Congress and War Power Resolution), [August 02, 1999].

²⁰³ Members of Congress' statements supporting the President can be found in Jean Edward Smith, *George Bush's War* (New York, NY: Henry Holt and Company, 1992), 102.

²⁰⁴ Doherty, "Congress Worried About Oil, Threat to Saudi Arabia," 2533

²⁰⁵ Ibid.

defensive...[and that] this deployment will facilitate a peaceful resolution of the crisis.”²⁰⁶ Nonetheless, despite the fact that with this report President Bush appeared to challenge Congress, he also made some efforts to keep members of Congress informed about what was happening in order to prevent their directing major criticism at him. On August 28, the President invited a group of lawmakers to dinner at the White House, on which occasion he and top officials briefed them about the situation. This approach to Congress allowed President Bush “...to keep criticism of administration policy to a minimum.”²⁰⁷ It was, however, far from what could be called a “consulting process”.

The congressional approach to the Gulf crisis, however, was going to change from a “national crusade embraced by Congress...to a policy matter.”²⁰⁸ This change began with the administration’s efforts to pass a \$1.9 billion supplemental appropriation request, which included a plan to forgive Egypt’s \$6.7 billion military debt, and to convince Congress to approve a \$20 billion arms deal with Saudi Arabia.²⁰⁹ The discussion regarding these issues showed that the initial congressional support for the President’s decisions was declining.

Although reluctantly, and within the context of “policy matter” framework rather than a “national crusade,” still in October both chambers of Congress passed non-binding resolutions supporting the president’s Gulf policy.²¹⁰ This represented the first time that congressional support

²⁰⁶ Carroll J. Doherty, “Members Back Sending Troops to Gulf...but Worry about Dawn-Out Crisis,” *Congressional Quarterly Weekly Report* 48, no. 32 (1990): 2598.

²⁰⁷ Carroll J. Doherty, “Members Rally Around Flag as Bush Solicits Support,” *Congressional Quarterly Weekly Report* 48, no. 35 (1990): 2777.

²⁰⁸ Carroll J. Doherty, “Gloves Come Off as Congress Swipes at Administration,” *Congressional Quarterly Weekly Report* 48, no. 35 (1990): 2777.

²⁰⁹ Ibid.

²¹⁰ The Senate passed its resolution on October 3 by 96-3. The House approved its legislation by 320-29, in Carroll

for the administration's policy toward the Gulf crisis had been put on record.²¹¹ At the same time, the way these resolutions were discussed reflected opposing congressional concerns about their meaning. On the one hand there were lawmakers who, having the Tonkin Gulf in mind, feared giving the president a blank check to handle the Gulf crisis with total freedom of action. On the other hand, some members of Congress were concerned about introducing restrictions on presidential war powers.²¹²

During this time Congress also began to complain about the administration's policy regarding the consultation process. Regardless of legal considerations with respect to the framework provided by the War Powers Resolution,²¹³ congressional complaints had more to do with the fact that lawmakers lacked sufficient information to understand the situation and to participate in the decision making process. Lawmakers were concerned that "the level of consultation provided by the administration [was] not adequate in light of the massive U.S. commitment that now [involved] more than 175,000 U.S. soldiers, sailors and airmen....Moreover, there [was] a widespread fear that if war [broke] out the administration could present Congress with a fait accompli."²¹⁴

This feared fait accompli was not far from what really happened. In October 1990, the congressional leadership decided that it was worthwhile to designate a joint bipartisan group of

Doherty, "Both Chambers Craft Resolutions Backing Bush's Gulf Policy," *Congressional Quarterly Weekly Report* 48, no. 40 (1990): 3240.

²¹¹ Ibid.

²¹² Ibid.

²¹³ According to Carroll J. Doherty, "Congress [had] shown no inclination to demand that the administration invoke the War Powers Resolution in the Gulf crisis," in Doherty, "Consultation on the Gulf Crisis Is Hit-or-Miss for Congress," 3440.

²¹⁴ Ibid.

members to be available for consultation on Gulf developments during adjournment.²¹⁵ This group consisted of the congressional leaders and the chairmen and ranking minority members of the national security committees.²¹⁶ Yet in spite of congressional efforts to facilitate the consultation process, the administration seemed not to be concerned with this issue. Even though this consultation group was already in operation—President Bush had met with the group on October 30—it was not informed about the presidential decision to double the number of U.S. troops in the area. On November 8 President Bush ordered an additional deployment of 200,000 troops to the Gulf, having already decided on an offensive military option. This decision was reported to the consultation group only on November 14. Two days later, President Bush reported this deployment to Congress, though emphasizing that hostilities were not imminent.²¹⁷

The president's failure to ask Congress' advice about shifting from a defensive to an offensive option produced serious fissures between the two branches of government. In other words, the congressional "laissez-faire attitude ended abruptly when Bush decided to vastly increase the already huge force of U.S. troops in the region."²¹⁸ Recognizing this shift as a dangerous fact, President Bush realized that no military offensive was possible if the administration could not count on congressional support. On January 8, 1991, President Bush sent a letter to Congress requesting authorization to intervene against Iraq in Kuwait, yet without mentioning the

²¹⁵ Burgin, *Rethinking the Role of the War Powers Resolution: Congress and the Persian Gulf War*, 26.

²¹⁶ Carroll J. Doherty, "Members See Prospect of War Before the Year is Out," *Congressional Quarterly Weekly Report* 48, no. 43 (1990): 3630.

²¹⁷ Burgin, *Rethinking the Role of the War Powers Resolution: Congress and the Persian Gulf War*, 26.

²¹⁸ Carroll J. Doherty, "Uncertain Congress Confronts President's Gulf Strategy," *Congressional Quarterly Weekly Report* 48, no. 46 (1990): 3880.

War Powers Resolution.²¹⁹ On January 12, 1991, both chambers, on divided votes approved resolutions authorizing the use of military force against Iraq. The Senate voted 52-47, and the House approved identical legislation by a vote of 250-183.²²⁰

2. Haiti

After the continual failure of the international community's effort to arrive at a political agreement regarding the Haitian political crisis, this was finally achieved on July 3, 1993, in the "Governor's Island Accords." On this occasion the ousted President Jean Bertrand Aristide and General Raul Cedras agreed on a peaceful transition process for the return of President Aristide to power by October 30 and the democratization of Haitian society. According to the provisions of this settlement, on August 27 the U.N. suspended economic sanctions imposed to Haiti, and on September 23 U.N. Security Council Resolution 867 authorized the deployment of U.N. personnel to Haiti. In spite of an uncertain and indeed dangerous environment, the first U.N. units arrived in Port-au-Prince on October 6, 1993, as an advance party for the peacekeeping force. The arrival of the main body of U.N. peacekeeping forces, however, did not work out as it had been planned. On October 11, a crowd of Haitians impeded the docking of the US Navy landing ship *Harlan County* (LST-1196) by threatening violence. Due to this situation, the *USS Harlan County* turned around, the U.N. re-imposed the embargo on Haiti, and the United States administration had to face a critical international issue, territorially very close to its mainland.²²¹

²¹⁹ Carroll J. Doherty, "Bush Is Given Authorization To Use Force Against Iraq," *Congressional Quarterly Weekly Report* 49, no. 2 (1991): 70.

²²⁰ *Ibid.*, 65.

²²¹ Adam B. Siegel, *The Intervention of Haiti*, Professional Paper 539 (Alexandria, VA: Center for Naval Analysis, August 1996), 5-6.

From the beginning of this crisis, and particularly after the failure of the landing of UN troops from the *USS Harlan County* at Port-au-Prince, there existed opposite approaches and views within Congress regarding the Clinton administration's policy towards Haiti. Opinions were divided mainly over the types of pressure to be put on the Haitian military junta and the democratic features of Aristide's ousted government.

Regarding the types of action the U.S. should take there were two views. The first one, representing the majority of members of Congress, encouraged the President to toughen the embargo in order to pressure Haiti's military rulers to step down and permit the return of President Aristide.²²² The strongest supporter of this view was the Congressional Black Caucus. The opposite view was represented by a faction of liberals who were in favor of using military force to put major pressure on the Haitian military. Among these liberals was Sen. Tom Harkin, D-Iowa, who argued that "tightening the economic screws without the threat of force will not dislodge Haiti's rulers."²²³ Connie Mack, R-Fla., also stated, "The only way we can facilitate change in Haiti is with a credible statement of willingness to use force....And that is missing from this policy."²²⁴ The policy criticized by the liberals was the one that President Clinton had adopted six days after six senators had introduced legislation that was intended to force him to impose tougher sanctions. The president's policy precisely consisted in tightening economic sanctions against Haiti, yet without making any reference at this stage to military actions.

²²² Mary E. Kortanek, "Democrats Push Clinton to Toughen Embargo," *Congressional Quarterly Weekly Report* 52, no. 16 (1994): 1015.

²²³ Carroll J. Doherty, "President Broadly Criticized For Talk of Military Action," *Congressional Quarterly Weekly Report* 52, no. 168 (1994): 1134.

²²⁴ Ibid.

With respect to the democratic features of Aristide's government, there was a clear disagreement between Democrats and Republicans. While the former supported the return of Aristide as a democratically elected president, the latter deeply doubted this feature. Sen. Jesse Helms, R-NC, the ranking minority member on the Foreign Relations Committee, considered Aristide a "mentally unstable 'psychopath.'"²²⁵ The Democrats, though acknowledging the weaknesses of this democracy, countered that Aristide had won the 1990 presidential election in a landslide (70 percent of the vote), becoming Haiti's first democratically elected president. Referring to this fact, Sen. Christopher J. Dodd, D-CT., argued, "I've never come close to getting 70 percent of the vote....That's about as good a mandate as I've seen in this hemisphere."²²⁶

Taking into consideration the difficulties briefly discussed above, the Clinton Administration faced the crisis without ruling out any measure that might contribute to success, including the military option. On the contrary, by early May President Clinton had given strong signs of moving in that direction when he stated that the administration was disregarding the military solution,

[b]ut given how many people are being killed,...and the abject misery of the Haitian people, and the fact that democracy was implanted by the people and then uprooted by the military rulers there, I think that we cannot afford to discount the prospect of a military option.²²⁷

In fact, this alternative became a much more attractive possibility to President Clinton when on May 11, 1994, Supreme Court Judge Emile Jonassaint was appointed by the Haitian military as Haiti's provisional president.²²⁸ This decision was considered by the Clinton administration as a signal that the only way to convince General Cedras to step back was to invade

²²⁵ Carroll J. Doherty, "Democrats Hit Administration Over Aristide's Ongoing Exile," *Congressional Quarterly Weekly Report* 52, no. 10 (1994): 613.

²²⁶ Ibid.

²²⁷ Doherty, "President Broadly Criticized for Talk of Military Action," 1134.

Haiti by military force. Therefore, that became the administration's preferred option.²²⁹ The Congress, however divided, did not agree with the military option. On May 24 a center-right bipartisan coalition led by Rep. Porter J. Goss, R-Fla., proposed a non-binding amendment to the fiscal 1995 defense authorization bill (HR 4301) setting special provisions for the use of U.S. forces in Haiti.²³⁰ The amendment expressed "the sense of Congress that U.S. military action should not be taken against Haiti unless the president certified to lawmakers that intervention was required by a 'clear and present danger' to U.S. citizens or interests."²³¹ After long debate and attempts to replace it, the House adopted this amendment 223-201.²³² The Senate also made attempts to set conditions for the use of U.S. military force in Haiti. In June 1994, Sen. Judd Gregg, R-N.H., introduced an amendment to the fiscal 1995 foreign operations bill (S Res. 4426) by which the president "would have been required to seek congressional authorization before ordering military action against Haiti."²³³ If the president had wanted to avoid this requirement, he would have been able to do so by submitting to Congress a written report stating the objectives of such a mission.²³⁴ This amendment was defeated 34-65 on June 29, and then the Senate voted for a milder, non-

²²⁸ Elizabeth A. Palmer, "A Haitian Chronology," *Congressional Quarterly Weekly Report* 52, no. 36 (1994): 2579.

²²⁹ The administration, however, imposed additional economic sanctions on Haiti, banning commercial air services between the United States and Haiti and restricting financial transactions.

²³⁰ Pat Towell, "On Issue of Using Military Abroad...House Marches to Different Drum," *Congressional Quarterly Weekly Report* 52, no. 21 (1994): 1402.

²³¹ *Ibid.*

²³² The House, however, took a second vote on this amendment and rejected it 195-226, in *Congressional Quarterly Weekly Report* 52, supplement to no. 35 (1994): 35.

²³³ Carroll J. Doherty, "Senate Defeats GOP Proposal to Limit Clinton on Haiti," *Congressional Quarterly Weekly Report* 52, no. 26 (1994): 1814.

²³⁴ *Ibid.*

binding one “urging the president to seek congressional approval before committing troops to Haiti.”²³⁵

The last effort to restrain the president from acting militarily without congressional authorization came through an amendment, proposed by Minority Leader Sen. Bob Dole, R-KS, to the fiscal 1995 foreign appropriations bill. This amendment would have created a bipartisan commission on Haiti to assess diplomatic and political conditions in the country, reporting its findings to Congress within 45 days of the bill’s amendment.²³⁶ This amendment was finally tabled (killed) 57-42 on July 14, 1994, its opponents arguing that it “would undercut international pressure on Haiti’s military rulers.”²³⁷

Entering September 1994, the U.N. Security Council having by resolution 940 authorized the “use of all necessary means,” the Clinton administration had already decided to invade Haiti. This operation, however, was pending a last non-military effort to resolve the crisis: the use of a coercive diplomacy policy. Along with the ongoing military operation to invade Haiti—without prior authorization from Congress to do so—on September 16, 1994, President Clinton dispatched political envoys to Haiti “...to try to persuade military leaders to step down voluntarily.”²³⁸ The group consisted of former President Jimmy Carter, former Joint Chiefs of Staff Chairman Gen. Colin Powell, Jr., and Senate Armed Services Committee Chairman Sam Nunn, D-GA. While the military assets were approaching Haitian shores, the U.S. delegation “succeeded in arranging a peaceful

²³⁵ Ibid.

²³⁶ Carroll J. Doherty, “Senate Declines to Restrict Clinton’s Options on Haiti,” *Congressional Quarterly Weekly Report* 52, no. 28 (1994): 1943.

²³⁷ Ibid.

²³⁸ Carroll J. Doherty, “President, Rebuffing Congress, Prepares to Launch Invasion,” *Congressional Quarterly Weekly Report* 52, no. 36 (1994): 2578.

military occupation of the country."²³⁹ This last-minute settlement avoided a military confrontation with the weak Haitian military and permitted the mission to be shifted to a peace enforcement operation.²⁴⁰ Accordingly, without congressional authorization, U.S. troops arrived peacefully in Port-au-Prince on September 19, 1994.

According to the facts described, the Persian Gulf War and the U.S. military intervention in Haiti clearly demonstrate the disagreement that exists between the President and Congress regarding the use of war powers. They also show the lack of presidential willingness to let Congress be informed about the facts and analysis that might lead the President to send U.S. troops abroad.. These cases, nonetheless, being similar with respect to the framework that causes the disagreement, present one important difference related to the national interest. Comparing the Persian Gulf crisis with the Haitian crisis, it appears clear that in the former the national interest was well identified, while in the latter it was not. The conclusion to be drawn from this is that whether there is a clear national interest at stake or not makes a big difference in congressional support for presidents' decisions regarding foreign affairs issues. In the Gulf crisis there was no doubt in lawmakers' minds that Saddam's invasion of Kuwait and the danger that he would continue his offensive action toward Saudi Arabia seriously threatened the United States' interests. There was an urgency to secure a steady flow of oil from the Middle East to the industrialized world.²⁴¹ According to John Norton Moore,

²³⁹ Alexander L. George, "The Role of Force in Diplomacy: A Continuing Dilemma for U.S. Foreign Policy," in *Managing Global Chaos: Sources of and Responses to International Conflicts*, ed. Chester A. Crocker and Fen Osler Hampson with Pamela Aal (Washington, D.C.: United States Institute of Peace, 1998), 220.

²⁴⁰ According to Adam B. Siegel, the U.S.-led multinational intervention in Haiti had three phases, the second of which was characterized as a peace enforcement operation. These phases were: Coercive diplomacy (September 1994), peace enforcement (September-October 1994), and Multidimensional peacekeeping (October 1994 to March 31, 1995), in Siegel, *The Intervention of Haiti*, 11.

²⁴¹ Carroll J. Doherty, "Action on Middle East Crisis Only a Matter of Time", *Congressional Quarterly Weekly Report*

[T]o ignore the global economic consequences of a protracted oil crisis would be to ignore reality. An Iraq with Kuwait would control more than one-fifth of total world oil reserves, and if Iraq had been able to even marginally intimidate Saudi Arabia and the Emirates, with another one-fifth of world reserves, it could have dictated financial terms for a not inconsiderable future.²⁴²

Yet there was still another issue that conflicted with the U.S. national interest: the credibility of national commitments. In John Norton Moore's words,

If the commitment made by the United States, the principal democracies of the world, and—within the region—the League of Arab States, against aggression and for the rule of law had turned out to be mere paper commitments in the Gulf crisis, then aggressive wars would be more—not less—likely in the future, and the rule of law would be mere hypocritical aspirations—not reality.²⁴³

Conversely, in the Haitian case there was no clear and across-the-board understanding about what national interests were at stake. According to James Terry, this was especially relevant because the use of peacekeeping operations as a way to interact militarily in the international arena was undergoing dramatic transformations. These transformations pose serious difficulties for the internal decision making process as it assesses the reasons why the United States should commit forces in particular situations, one of which was Haiti.²⁴⁴ Thus, if future conflicts in which the United States might be involved with military forces are the type of U.N. military operations, it is likely that the U.S. national interest in each crisis will become more and more difficult to identify. This fact argues for the necessity of strengthening the consulting process as a means of forging political agreement and compromises between the President and Congress in advance of the deployment of troops.

48, no. 33 (1990): 2674.

²⁴² John Norton Moore, *Crisis in the Gulf: Enforcing the Rule of Law*, (New York, NY: Oceana Publications, Inc, 1992), 9.

²⁴³ *Ibid.*, 10.

²⁴⁴ Terry, *The Criteria for Intervention: An Evaluation of U.S. Military Policy in UN Operations*, 102.

So far the dispute over war powers has not yet reached the level of a constitutional quarrel, but nobody can predict that this will not happen. If it does, it is likely to raise enormous difficulties in both the domestic and international arenas. Thus, any effort to avoid potential escalations of this dispute would be desirable.

The Persian Gulf War and the intervention in Haiti also reflect the executive concern about the efficiency factor, which has always been portrayed as the major reason why the executive branch of government ought to decide on war powers without any interference from Congress. Secretary of Defense Dick Cheney, asked about the significance of the congressional recess in August 1990, stated that "...it was an advantage that Congress was out of town....We could spend August doing what needed to be done rather than explaining it."²⁴⁵ Even President Bush, referring to the difficulties that a democratic system has with respect to the need for secrecy and efficiency, stated that he did not want to have Congress "...come back and end up where you have 435 voices in one house, and 100 in the other, saying what not to do...kind of hand-wringing operation that would send bad signals."²⁴⁶

Perhaps acknowledging the importance of efficiency and the fact that it could be adversely affected by opening the discussion to more participants, yet still asking for a major role in the decision making process, Congress took additional measures in both the Gulf and Haitian crises. These were the creation of the bipartisan consultation group in the Gulf crisis and the attempt to create a bipartisan group to assess diplomatic and political conditions in Haiti. These efforts, however, did not succeed. The former failed to accomplish its mission simply because President

²⁴⁵ Carroll J. Doherty, "Consultation on the Gulf Crisis Is Hit-or-Miss for Congress," 3441.

²⁴⁶ Pamela Palmer, "Bush Quiets His Critics on Hill by Sending Baker to Iraq," *Congressional Quarterly Weekly Report* 48, no. 48 (1990): 4007.

Bush never consulted with its members about important matters.²⁴⁷ The latter failed because the Senate did not approve the proposal to create it.²⁴⁸

Had the Senate approved this proposal in the Haitian case, however, the bipartisan group would have taken a different approach from that of the consultation group in the Gulf crisis to its relations with the president. In fact, the latter was expected to work *with the president*, seeking more efficiency and rapidity in the decision-making process. In addition, the Gulf crisis measure was to some extent intended to allow Congress to have major participation in the decisions regarding the crisis, perhaps with the goal of better accomplishing its legal duties regarding war powers. In contrast, the bipartisan group in the Haitian crisis would have had the task of reporting its findings to Congress, not to the President. This observation is important because it shows two different approaches of Congress toward its relations with the president, in the sense that the proposal in the Haitian case would have increased the conflict between Congress and the President. Conversely, the consultation group in the Gulf crisis, had President Bush sought its advice, would have helped to shape this relationship.

Summing up, the national interest and the efficiency factor constitute two elements to be considered in alternative solution to the presidential-congressional dispute over war powers. With respect to the former, if there is a consensus between the executive and legislative branches of federal government about what is really at stake in a specific international crisis, there should be no major dispute about the means to employ in it. Related to the latter, there is no doubt that the employment of military force overseas requires a very efficient way of implementation. For doing

²⁴⁷ According to Eileen Burgin, President Bush did not consult on the decision to double the number of U.S. troops in November. Likewise, he did not do so on his decision to seek a UN Security Council Resolution authorizing members to use "all necessary means" to force Saddam to pull his forces out of Kuwait, in Burgin, *Rethinking the Role of the War Powers Resolution: Congress and the Persian Gulf War*, 29.

²⁴⁸ See Doherty, "Senate Declines to Restrict Clinton's Options on Haiti," 1943.

so, the President as commander-in-chief should have the freedom of action to take all the measures to succeed. This matter will be addressed in the next and final chapter.

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VI. FINDINGS AND PROPOSALS

A. SUMMARY OF FINDINGS

In accordance with the constitutional principle of separation of powers, each of the federal branches of government is empowered to perform a number of duties, which the Constitution itself grants the powers to accomplish. The Constitution also incorporates the principle of checks and balances, vesting in the federal branches of government the power to control one another, seeking to avoid by this means arbitrariness and abuses of power. Finally, the way the Constitution was written and has been interpreted makes the branches exercise their power under a sharing doctrine approach, which means that separation of powers is not a principle to be applied in an absolute fashion. On the contrary, the way the Constitution granted the powers to the federal government compels the branches to work together in the processes related to decision-making.

This framework also applies to war powers, in which both the Constitution and the statutory law set forth a number of regulations with the idea of making the President and Congress arrive at agreeable solutions in this area. This goal, however, has never been accomplished. From the beginning, the legal framework created a permanent struggle between the executive and legislative regarding war powers, a struggle that has increased since Congress passed the War Powers Resolution, which became law in 1973 over a presidential veto. In fact, as was mentioned in Chapter IV, this methodology, intended to make Congress and the President work closely in a constitutional gray area, in the end resulted in a new subject of controversies between them.

Despite the fact that so far this dispute has been managed without reaching the level of a political crisis, there is some evidence that this might no longer be possible in the future. The fact that supports this assessment is that the specific features of current international crises—bounded

by a post-Cold War scenario—make it very difficult to identify accurately what national interest is at stake in each one of them. This lack of certainty about the national interest leads to an additional hardness in deciding whether the United States should get involved in those crises and, if it should, how. Because of the difficulties in making such decisions, and also because of the constitutional roles of both the President and the Congress in participating—under a power sharing approach—in the decision making process, it can be argued that the provisions enacted in the War Powers Resolution are not appropriate. This is so because the War Power Resolution focuses its attention on the measures to be taken by Congress after the President has decided to deploy military troops in critical situations abroad, instead of addressing procedures to assure a close presidential-congressional close relationship before the decision is taken. Put in another way, what the War Powers Resolution creates is a legal environment in which the President and the Congress are called upon to share the war powers, yet in a very controversial manner.

It could be argued that this situation could be resolved in a political fashion: in each foreign crisis, President and Congress could agree on the procedures that would allow them to work together, to determine the best solution. This argument, however, is challenged by reality. As has been seen in the studies of the Persian Gulf War and the intervention in Haiti, in neither of these Congress approved the presidential actions related to the use of military force. The only element of difference between these cases was the congressional certainty about what national interest the former crisis represented to the United States, which was missing in the latter crisis. Beyond this difference, nonetheless, these crises represent a good sample of the political struggle that arises between the two branches regarding the implementation of the shared war powers doctrine.

Therefore, and acknowledging that most of the time it is not the best alternative, the solution to this dispute ought to come from the legal aspect of it, which raises the necessity of

reforming the law. In this vein, there have been several academic proposals, focusing their attention on strengthening the congressional authority on war powers in order to make the President comply with the provisions of the War Powers Resolution. One of the most important of these contributions is the proposal made by John Hart Ely, in which he considered the necessity of enacting a "War Powers (Combat Authorization) Act." In this proposal professor Ely suggested a "revised version of the War Powers Resolution that is calculated to achieve more effectively the goal of forcing the president to seek congressional authorization before (or if necessary simultaneously with) involving the nation's troops in armed combat, and thus forcing Congress to perform its constitutional duty of deciding whether we go to war."²⁴⁹ Furthermore, professor Ely's proposal included the idea of involving the federal judiciary in the process, "for inducing presidential and congressional compliance" with the law.²⁵⁰

Academic proposals oriented to strengthening the power of Congress on war powers, however, have faced strong opposition. Professor Abraham D. Sofaer is one of the most relevant scholars who disagrees with these proposals, specifically with professor Ely's proposal. In this matter, Professor Sofaer argues that efforts in this direction "...are not only futile, but harmful to our national interest."²⁵¹ He adds: "Over two hundred years of practice have led to understandings between the branches concerning the use of force that have worked reasonably well."²⁵² Professor Sofaer, nonetheless, does agree on the necessity of making changes "...both to ensure that Congress always receives the information it needs to use its authority effectively, and to prevent

²⁴⁹ John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath* (Princeton, NJ: Princeton University Press, 1993), 115.

²⁵⁰ Ibid.

²⁵¹ Abraham D. Sofaer, "The Power over War," *University of Miami Law Review*, no. 1 (October 1995): 34.

secret uses of force."²⁵³ Following Professor Sofaer's opinion, changes then should move in the direction of making Congress more knowledgeable about each situation before it has to use its war powers. In this vein, since presidents do not seem willing to let Congress receive this information, what seems to be the only solution in this regard is to force presidents to do so, which would need to be done by means of a law.

B. THE PROPOSAL

According to this argument, this thesis proposes a different legal framework, which would not merely suggest that the President and the Congress share war powers, but would directly mandate by statutory law that they work closely on war powers issues before political decisions in this regard are taken. Such a law would strengthen the consultation process during the period in which crises are in their initial stages, forcing discussions at a presidential-congressional level of the factors that would lead to a decision to send U.S. troops to participate militarily in such crises. This consultation-forcing process, however, ought to respect the constitutional principle of separation of powers, which implies that none of the branches of federal government should intervene in matters that are not constitutionally under its jurisdiction.

In order to accomplish the goal of strengthening the consultation process between the President and the Congress with total respect for the constitutional principle of separation of powers, the specific proposal consists in introducing changes in the way the National Security Council manages these issues. Specifically there are two main changes to introduce in this regard:

²⁵² Ibid, 35.

²⁵³ Ibid.

1. To make members of Congress participate in the meetings held by the National Security Council as statutory observers, with the right to ask questions related to the topics discussed and to express their opinions on the specific matters under discussion.

2. To make it mandatory that the President request the formal advice of the National Security Council in every situation in which a decision to send U.S. troops to participate in a foreign crisis must be made.

With regard to the first change, the National Security Council is the institution of the national security establishment in charge of advising the President on national security matters. To that end, it is required that all the departments and agencies of the executive government related to national security gather in this council in order to coordinate and integrate its efforts to make this advice valuable.²⁵⁴ Nonetheless, it cannot be forgotten that what is discussed in this council are the key elements that the national government, not only the executive branch, must take into serious consideration before a decision is taken. In this vein, since Congress is a very important actor in the utilization of war powers, the National Security Council is the right instance in which the legislative body should participate, receiving all the strategic and political information needed to make wise decisions on this matter. Furthermore, since Congress' opinion is important for the President, this is also the right place to receive it, avoiding the waste of time and effort of getting it by other means. In other words, the integration process should consider not only the departments and agencies of the executive branch, but Congress as well.

This change does not represent a shift in the legal nature of the National Security Council, which would still remain a component of the executive branch of federal government. What this

²⁵⁴ Christopher C. Shoemaker, *Structure, Function and the NSC Staff: An Officer's Guide to the National Security Council* (Carlisle Barracks, PA: Strategic Studies Institute, 1989), 33.

change really means is that, in the presidential process of deciding whether the United States should deploy military troops in foreign crises, two actors would directly benefit from the incorporation of members of Congress into the National Security Council: the President, who could know the general feeling of Congress in this regard, and Congress, which could be appropriately briefed about the implications of the crises, mainly in terms of the national interest. Likewise, this proposal is not intended to make Congress accountable for the presidential decision that would be made after the National Security Council meetings. In this connection, Congress would remain with all its power to act as it thinks it should, either supporting or opposing what the President resolve. The only aspect of Congress' decisions that would change is its capacity to decide what is the best, having all the information it would need provided directly by the establishment in charge of producing such information.

With respect to the second change, since the National Security Council was created as the necessary asset to improve the decision-making process, providing the President proper advice on these matters, it seems inexcusable that the President does not use it appropriately. To use it appropriately means both to request its advice in every situation in which the government must decide whether to send military troops to engage in foreign crises, and to do so under specific criteria, one of which should be the mandatory attendance of all its members in order to have a quorum to proceed. To put this proposal in a different perspective, what has to be eliminated is the discretionary power that the President actually has in using the National Security Council. Because of the consequences of decisions to go to war—or at least to move in that direction—are so relevant for the United States, these decisions should be taken after a very deep decision making process. In this process, the advice of the National Security Council should be mandatory—not discretionary—for presidents.

This mandatory advice by any means implies that the President have to implement what the National Security Council advises. As the head of the executive branch of government—nonetheless taking into consideration the sharing power doctrine—the President has the constitutional power to decide what is best for the country in every situation, being accountable for these decisions. What the system must ensure is that the President has all the information needed for taking the right decisions as commander-in-chief.

In order to make the proposed changes possible, at least both the National Security Act of 1947 and the War Powers Resolution should be amended. The former should be amended to make National Security Council meetings mandatory—establishing specific criteria under which these meetings should be held—when the topics to be discussed are related to sending troops to foreign crises, and also to allow members of Congress to attend these meetings as statutory observers with the right to participate, asking questions and expressing opinions. The latter should be amended to explicitly regulate the way the consultation process considered in Section 3 of this law should be strengthened. Among other criteria to be included, are the necessity of making it mandatory that the President consults with Congress in case the situations described in this section happen, and the necessity of establishing the procedures by which Congress would participate in the National Security Council meetings.

C. FINAL WORDS

With this proposal it is expected that the President and Congress could work together on an amicable basis. Furthermore, the changes proposed do not necessarily affect the efficiency with which the war powers must be used, which is a very important element to bear in mind. In this vein, there are several ways in which Congress might be able to participate in the National Security Council meetings without affecting either efficiency, the functioning of the NSC, or the

congressional ability to be well informed about what is happening. One of the options is a committee that would represent Congress at the NSC. This committee could be responsible to take congressional inquiries and opinions to the executive and also to bring to Congress both the contents of the discussions that would take place in this advisory body and the executive approach on a particular situation.

Nonetheless, the specific course of action to take in order to make this proposal work is beyond the purpose of this academic research. Furthermore, it is more than probable that the elements included in the proposal would meet strong opposition. Political opposition, in particular, may be expected if there is no political will to introduce such changes. This lack of will, however, does not mean that it would not be possible to make these changes. In the end, whether these are made or not will depend on the capacity of the political leaders of the United States to shape the best decision-making process regarding the new challenges that the country will have to face on national security issues. From a foreign point of view, the mere acquisition or just the maintenance of domestic parcels of power cannot deviate these leaders to seek what is the best for the U.S. national interest of the United States.

APPENDIX A. MAIN SUBJECTS CONTAINED IN THE WAR POWERS RESOLUTION OF 1973

ISSUE	PROCEDURE
Presidential Consultation	<p>Sec. 3. The President in every possible instance shall consult with Congress before introducing United States armed forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.</p>
Presidential Reports	<p>Sec. 4 (a). The President must report to Congress within forty-eight hours of sending the military:</p> <p style="padding-left: 40px;">Into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;</p> <p style="padding-left: 40px;">Into the territory, airspace, of waters of a foreign nation, while equipped for combat;</p> <p style="padding-left: 40px;">In numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation.</p> <p>This report must explain why the President sent the troops, describe the constitutional and legislative authority for doing that, and estimate the scope and duration of the intervention.</p> <p>(b) In addition to this report, the President must provide any further information requested by Congress.</p> <p>(c) Finally, so long as the armed forces continue to be engaged, the President must report to Congress periodically on the status of such situation.</p>
Congressional Termination of Military Action	<p>Sec. 5 (b) The resolution requires that within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4 (a)(1), whichever is earlier, the President shall terminate any use of United Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States.</p> <p>The sixty-day period may be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United Armed forces requires the continued deployment of such armed forces in the course of bringing about a prompt removal of such forces.</p> <p>(c) At any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if Congress so directs by concurrent resolution.</p>

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APPENDIX B. PRESIDENTIAL BEHAVIOR ON THE USE OF WAR POWERS

Crisis	Presidential Behavior
Vietnam evacuations and Mayaguez	On three occasions in April 1975 President Ford used U.S. forces to help evacuate American citizens and foreign nationals from Vietnam. In addition, in May 1975, President Ford ordered the retaking of a U.S. merchant vessel, the <i>S.S. Mayaguez</i> , which had been seized by Cambodian patrol vessels. The report on the Mayaguez was the only War Powers report to specifically cite section 4(a)(1), but the question of the time limit was moot because the action was over by the time the report was filed. ²⁵⁵
Iran hostage rescue attempt	After the unsuccessful attempt to rescue the American hostages on April 24, 1980, President Carter submitted a report to Congress to meet the requirements of the War Powers Resolution—but he did not consult in advance. The Administration took the position that consultation was not required because the mission was a rescue attempt, not an act of force or aggression against Iran. ²⁵⁶
Military advisers to El Salvador	Neither President Carter nor President Reagan reported the dispatch of U.S. military advisers to El Salvador. A State Department memorandum issued in 1981 said a report was not required because the U.S. personnel were not being introduced into hostilities or a situation of imminent hostilities, but that if a change in circumstances occurred that raised the prospect of imminent hostilities, the Resolution would be complied with. ²⁵⁷
Lebanon	In 1982 Marines were sent to participate in a multinational force in Lebanon. In August 1983 these forces became the targets of hostile fire. During this period President Reagan filed three reports under the War Powers Resolution, but he did not report under section 4(a)(1) that the forces were being introduced into hostilities or imminent hostilities, which would have triggered the 60-90 day time limit. On September 29, 1983, Congress passed the Multinational Force in Lebanon Resolution determining that the requirements of section 4(a)(1) of the War Powers Resolution had become operative on August 29, 1983. In the same resolution, Congress authorized the continued participation of the Marines in the multinational force for 18 months. The resolution was a compromise between Congress and the President. Congress obtained the President's signature on legislation invoking the War Powers Resolution for the first time, but the price for this concession was a congressional authorization for the U.S. troops to remain in Lebanon for 18 months.

²⁵⁵ Collier, "Statutory Constraints: The War Powers Resolution," in *The U.S. Constitution and the Power to Go to War*, 64.

²⁵⁶ Ibid.

²⁵⁷ Ibid., 65

²⁵⁸ Ibid., 67.

Crisis	Presidential Behavior
	Shortly afterward, on October 23, 1983, 241 U.S. Marines in Lebanon were killed by a suicide truck bombing. On February 7, 1984, President Reagan announced that the Marines would be "redeployed," and on March 30, 1984, he reported to Congress that U.S. participation in the multinational force in Lebanon had ended. ²⁵⁸
Grenada	On October 25, 1983, President Reagan reported to Congress "consistent with" the War Powers Resolution that he had ordered a landing of approximately 1,900 U.S. Army and Marine Corps personnel in Granada. Members of Congress contended that the President should have cited section 4(a)(1) of the War Powers Resolution, which would have triggered the 60-90 day time limitation. ²⁵⁹
Libya	In response to a terrorist bombing of a discotheque in West Berlin on April 5, 1986, which killed an American soldier, President Reagan ordered a bombing raid on headquarters, terrorist facilities, and military installations in Libya. The President reported the bombing to Congress, yet the report did not cite section 4(a)(1). ²⁶⁰
Persian Gulf I	The War Powers Resolution became an issue in activities in the Persian Gulf after an Iraqi aircraft fired a missile on the <i>U.S.S. Stark</i> on May 17, 1987, killing 37 U.S. sailors. For several months before this incident, the President had not reported any of the incidents under the War Powers Resolution, although on May 20, 1987, after the <i>U.S.S. Stark</i> incident, Secretary of State Schultz submitted a report similar to previous war powers reports but not mentioning the Resolution. Later, however, after various military incidents on September 23, 1987, the President began submitting reports "consistent with" the War Powers Resolution. None of these reports was submitted under section 4(a)(1) or acknowledged that U.S. forces had been introduced into hostilities or imminent hostilities. The Reagan administration contended that the military incidents in the Persian Gulf, or isolated incidents involving defensive reactions, did not add up to hostilities or imminent hostilities as envisaged in the War Powers Resolution. ²⁶¹
Panama	On December 20, 1989, President Bush ordered 14,000 U.S. military troops to Panama, in addition to 13,000 already present, for combat. On December 21 he reported to Congress under the War Powers Resolution but without citing section 4(a)(1). The operation proceeded swiftly, and General Noriega surrendered to U.S. military authorities on January 3, 1990. President Bush said the objectives had been met, and U.S. forces were gradually withdrawn. By February 13 all combat forces had been withdrawn, leaving the strength just under the 13,597 troops stationed in Panama prior to the invasion. ²⁶²
Persian Gulf II	On August 2, 1990, Iraqi troops under the direction of President Saddam Hussein invaded Kuwait and moved on toward the border with Saudi Arabia. A week after the invasion, on August 9, President Bush reported to Congress, "consistent with the War Powers Resolution," that he had deployed U.S. armed forces to the region prepared to take action with others to deter Iraqi aggression. In this report, he did not cite section (a)(1). On November 8, 1990, after the 101 st Congress had adjourned, President Bush ordered and estimated additional 150,000 troops to the Gulf. On November 16 President Bush sent a second report to Congress describing the continuing and increasing deployment of

²⁵⁹ Ibid., 67.

²⁶⁰ Ibid., 69.

²⁶¹ Ibid., 70.

²⁶² Ibid., 71.

Crisis	Presidential Behavior
	<p>forces to the region. He did not cite the War Powers Resolution, but stated that the action was a continuation of the deployment described in his August 9 report, and further that his opinion that hostilities were not imminent had not changed.</p> <p>After the 102nd Congress convened on January 4, 1991, President Bush requested a congressional resolution supporting the use of all necessary means to implement U.N. Security Council Resolution 678. The House and the Senate passed the "Authorization for Use of Military Force Against Iraq Resolution." On January 18 President Bush reported to Congress "consistent with the War Powers Resolution" that he had directed U.S. forces to commence combat operations on January 16. On March 19, 1991, President Bush reported to Congress that the military operations had been successful, Kuwait had been liberated, and combat operations had been suspended on February 28, 1991.²⁶³</p>
Somalia	<p>When President Bush decided to deploy 20,000 American troops to Somalia in December 1992 to create a secure environment for delivering humanitarian relief, he did not seek congressional approval for the mission. The Senate, two months after the initial deployment, adopted a resolution by voice vote authorizing the American participation in the initial U.S.-led phase of the Somalia operation. The House did not vote for three more months.</p> <p>When the Somalia operation shifted to UNOSOM II, President Clinton sought congressional support for American participation. After a divisive debate along party lines, the House adopted a resolution a few weeks later authorizing the participation of American troops in UNOSOM II for twelve months. The resolution explicitly provided specific statutory authorization under the War Powers Resolution. The Senate did not pass any authorization resolution.</p> <p>After Somali forces loyal to General Aideed killed 24 Pakistani peacekeepers, U.N. forces were authorized to apprehend Aideed. As part of this effort, President Clinton deployed U.S. Army Rangers to Somalia. He did not seek Congress' approval, however, for the subsequent combat operations against Aideed's forces during the summer and early fall of 1993. Nor did the President provide Congress or the American people with a full and clear explanation of American objectives in Somalia.²⁶⁴</p>
Bosnia	<p>In 1992, claiming that he had the authority under the Constitution to deploy troops overseas without congressional authorization, President Clinton committed the United States to sending over twenty thousand ground troops as part of an international peace implementation force. Three years later, the warring factions in the Bosnian conflict emerged from the conference rooms at Dayton with a blueprint for peace. The plan called for an international force (IFOR) of over sixty thousand troops, twenty thousand of which were to be American based on President's Clinton's 1992 commitment. Congress, however, disagreed with President Clinton on the need to deploy United States ground troops. Ultimately, nonetheless, Congress folded its hand and passed milquetoast</p>

²⁶³ Ibid., 72.

²⁶⁴ Jane E. Stromseth, *The President, and the Authority to Initiate Hostilities: Collective Force and Constitutional Responsibility* (University of Miami Law Review, October 1995), 168; available [Online]: LEXISNEXIS/LAWREV/ALLREV/ (War and Responsibility and Constitutional Lessons of Vietnam and its Aftermath and John Ely), [July 12, 1999].

²⁶⁵ Andrew K. Schiff, *The War Powers Resolution: From the Halls of Congress to the Ills of Bosnia* (The American University Journal of International Law & Policy, 1996), 30-33; available [Online]: LEXISNEXIS/LAWREV/ALLREV/

Crisis	Presidential Behavior
	measures supporting the troops but disagreeing with the deployment. ²⁶⁵
Haiti	President Clinton dispatched U.S. troops to Haiti in September 1994, with U.N. Security Council authorization, to remove the military regime of General Raul Cedras and restore President Jean Bertrand Aristide to power. The President had ample time to seek congressional authorization before ordering U.S. forces to Haiti; the deployment was not an emergency action to repel a sudden attack. President Clinton, however, did not seek authorization from Congress and contended that he was not constitutionally required to do so. ²⁶⁶ After the troops' arrival in Haiti the political conflict was no longer over the Congress' opposition to the administration's decision to send troops into a combat situation without authorization. Instead, Congress demanded a rapid withdrawal of the U.S. troops from Haiti. This demand, however, was not transformed into any binding resolution.
Kosovo	On March 26, 1999, President Clinton reported to Congress the commencement of military air strikes as part of NATO's operations against the Federal Republic of Yugoslavia (FRY) in response to the FRY Government's continued campaign of violence and repression against the civilian population of Kosovo. From this report and until the air campaign ended with Milosevic's acceptance of NATO's conditions, President Clinton issued to Congress four more reports regarding the military operations. Even though each of these reports was made under the provisions of the War Powers Resolution, in none of these was there any reference to section 4(a)(1). From the beginning, President Clinton stated that the Administration did not need Congress to authorize its military actions. Instead of authorization, President Clinton always declared that the Administration would welcome the "support" of Congress. ²⁶⁷

(War Powers Resolution and Bosnia), [November 10, 1999].

²⁶⁶ Stromseth, "Understanding Constitutional War Powers Today," 23.

²⁶⁷ Eliza Newlin Carney, "At last, Congress Enters the War Zone," *National Journal* 31, May 1, 1999 [journal on-line]; available from <http://proquest.umi.com/pqdweb>; Internet; accessed November 10, 1999.

SELECTED BIBLIOGRAPHY

BOOKS

Black, Henry Campbell. *Black's Law Dictionary*, 6th ed. St. Paul, MN: West Publishing CO, 1998.

Casper, Gerhard. *Separating Powers: Essays on the Founding Period*. Cambridge, MA: Harvard University Press, 1997.

Collier, Ellen C. "Statutory Constraints: The War Powers Resolution." In *The U.S. Constitution and the Power To Go to War*, ed. Gary M. Stern and Morton H. Halpern. Westport, CT: Greenwood Press, 1994.

Corwin, Edward S. and Jack W. Peltason. *Understanding the Constitution*, 3d ed. New York, NY: Holt, Rinehart and Winston, 1964.

Currie, David P. *The Constitution of the United States: A Primer for the People*. Chicago, IL: The University of Chicago Press, 1988.

Ely, John Hart. *War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath*. Princeton, NJ: Princeton University Press, 1993.

Epstein, David F. "The Political Theory of the Constitution." In *Confronting the Constitution*, ed. Allan Bloom. Washington, D.C.: American Enterprise Institute, 1990.

Fisher, Louis. *Constitutional Conflicts between Congress and the President*. Princeton, NJ: Princeton University Press, 1985.

_____. *The Politics of Shared Powers: Congress and the Executive*, 3d ed. Washington, D.C.: CQ Press, 1993.

Foley, Michael and John E. Owens. *Congress and the Presidency: Institutional Politics in a Separated System*. Manchester: Manchester University Press, 1996.

George, Alexander L. "The Role of Force in Diplomacy: A Continuing Dilemma for U.S. Foreign Policy." In *Managing Global Chaos: Sources of and Responses to International Conflicts*, ed. Chester A. Crocker and Fen Osler Hampson with Pamela Aal. Washington, D.C.: United States Institute of Peace, 1998.

Gunther, Gerald and Kathleen M. Sullivan, *Constitutional Law*, 13th ed. Westbury, N.Y.: The Foundation Press, 1997.

Hamilton, Alexander. "The Federalist No. 23." In *The Federalist Papers*. New York, NY: The New American Library, 1961.

_____. "The Federalist No. 26." In *The Federalist Papers*. New York, NY: The New American Library, 1961.

_____. "The Federalist No. 66." In *The Federalist Papers*. New York, NY: The New American Library, 1961.

_____. "The Federalist No. 23." In Congressional Research Library of Congress. *The Constitution of the United States of America: Analysis and Interpretation*, ed. Johnny H. Killian and George A. Costello. Washington, D.C.: U.S. Governing Printing Office, 1996.

Holt, Pat M. *The War Powers Resolution: The Role of Congress in U.S. Armed Intervention*. Washington, D.C.: American Enterprise Institute, 1978.

Hongju Koh, Harold. "Judicial Constraints: The Courts and War Powers." In *The U.S. Constitution and the Power to Go to War*, ed. Gary M. Stern and Morton H. Halpeirn. Westport, CT: Greenwood Press, 1994.

Jay, John. "The Federalist No. 3." In *The Federalist Papers*. New York, NY: The New American Library, 1961.

_____. "The Federalist No. 4." In *The Federalist Papers*. New York, NY: The New American Library, 1961.

Keynes, Edward. *Undeclared War: Twilight Zone of Constitutional Power*, 1st paperback ed. Pennsylvania, PA: The Pennsylvania State University, 1991.

Madison, James. "The Federalist No. 47." In *The Federalist Papers*. New York, NY: The New American Library, 1961.

Moore, John Norton and Robert F. Turner. *The Legal Structure of Defense Organization*. Memorandum prepared for the President's Blue Ribbon Commission on Defense Management. N.p., January 15, 1986.

_____. "The War Power Resolution: A Debate between Professor John Norton Moore and Frederick S. Tipson." In *National Security Law*, ed. John Norton Moore, Frederick S. Tipson, and Robert F. Turner. Durham, NC: Carolina Academic Press, 1990.

_____. *Crisis in the Gulf: Enforcing the Rule of Law*. New York, NY: Oceana Publications, 1992.

Morris, Richard. "The Origin and Framing of the Constitution." In *The United States Military under the Constitution of the United States*, ed. Richard H. Kohn. New York, NY: New York University Press, 1991.

Muskie, Edmund S. Introduction to *The Constitution and National Security*, ed. Howard E. Schuman and Walter R. Thomas. Washington D.C.: National Defense University Press.

Prados, John. *Keepers of the Eyes: A History of the National Security Council from Truman to Bush*. New York, NY: William Morrow and Company, 1991.

Sarkesian, Sam C. *U.S. National Security: Policymakers, Processes, and Politics*. Boulder, CO: Lynne Rienner Publishers, 1989.

Schlesinger, Jr., Arthur M. *The Imperial Presidency*. Boston, MA: Houghton Mifflin Company, 1973.

Shoemaker, Christopher C. *Structure, Function and the NSC Staff: An Officer's Guide to the National Security Council*. Carlisle Barracks, PA: Strategic Studies Institute, 1989).

Siegel, Adam B. *The Intervasion of Haiti*. Professional Paper 539. Alexandria, VA: Center for Naval Analysis, August 1996.

Smith, Jean Edward. *George Bush's War*. New York, NY: Henry Holt and Company, 1992.

Tipson, Frederick S. "National Security and the Role of Law." In *National Security Law*, ed. John Norton Moore, Frederick S. Tipson, and Robert F. Turner. Durham, NC: Carolina Academic Press, 1990.

_____. *Presidential War Powers*. Lawrence, KS: University Press of Kansas, 1995..

Turner, Robert F. *The War Powers Resolution: Its Implementation in Theory and Practice*. Philadelphia, PE: Foreign Policy Research Institute, 1983.

_____. *Repealing the War Powers Resolution: Restoring the Rule of Law in U.S. Foreign Policy*. Washington, DC: Macmillan Publishing Company, 1991.

Westerfield, Donald L. *War Powers: The President, the Congress, and the Question of War*. Westport, CT: Praeger, 1996.

PERIODICALS

Biskupic, Joan. "Members Argue Suit Over War Powers." *Congressional Quarterly Weekly Report* 48, no. 49 (1990).

Doherty, Carroll J. "Consultation on the Gulf Crisis is Hit-or-miss for Congress." *Congressional Quarterly Report* 48, no. 41 (1991).

_____. "Congress Worried About Oil, Threat to Saudi Arabia." *Congressional Quarterly Weekly Report* 48, no. 31 (1990).

_____. "Hill Support Remains Firm, but Questions Surface." *Congressional Quarterly Weekly Report* 48, no. 36 (1990).

_____. "Members Back Sending Troops to Gulf...but Worry about Dawn-Out Crisis." *Congressional Quarterly Weekly Report* 48, no. 32 (1990).

_____. "Members Rally Around Flag as Bush Solicits Support." *Congressional Quarterly Weekly Report* 48, no. 35 (1990).

_____. "Gloves Comes Off as Congress Swipes at Administration." *Congressional Quarterly Weekly Report* 48, no. 38 (1990).

_____. "Both Chambers Craft Resolutions Backing Bush's Gulf Policy." *Congressional Quarterly Weekly Report* 48, no. 40 (1990).

_____. "Members See Prospect of War Before the Year is Out." *Congressional Quarterly Weekly Report* 48, no. 43 (1990).

_____. "Uncertain Congress Confronts President's Gulf Strategy." *Congressional Quarterly Weekly Report* 48, no. 46 (1990).

_____. "Bush Is Given Authorization To Use Force Against Iraq." *Congressional Quarterly Weekly Report* 49, no. 2 (1991).

_____. "President Broadly Criticized For Talk of Military Action." *Congressional Quarterly Weekly Report* 52, no. 168 (1994).

_____. "Democrats Hit Administration Over Aristide's Ongoing Exile." *Congressional Quarterly Weekly Report* 52, no. 10 (1994).

_____. "Senate Defeats GOP Proposal to Limit Clinton on Haiti." *Congressional Quarterly Weekly Report* 52, no. 26 (1994).

_____. "Senate Declines to Restrict Clinton's Options on Haiti." *Congressional Quarterly Weekly Report* 52, no. 28 (1994).

_____. "President, Rebuffing Congress, Prepares to Launch Invasion." *Congressional Quarterly Weekly Report* 52, no. 36 (1994).

_____. "Action on Middle East Crisis Only a Matter of Time." *Congressional Quarterly Weekly Report* 48, no. 33 (1990).

Glennon, Michael J. "The Gulf War and the Constitution." *Foreign Affairs* 70, no. 2 (1991).

Kortanek, Mary E. "Democrats Push Clinton to Toughen Embargo." *Congressional Quarterly Weekly Report* 52, no. 16 (1994).

Palmer, Elizabeth A. "A Haitian Chronology." *Congressional Quarterly Weekly Report* 52, no. 36 (1994).

Palmer, Pamela. "Bush Quiets His Critics on Hill by Sending Baker to Iraq." *Congressional Quarterly Weekly Report* 48, no. 48 (1990).

Sofaer, Abraham D. "The Power over War." *University of Miami Law Review*, no. 1 (October 1995).

Towell, Pat. "On Issue of Using Military Abroad...House Marches to Different Drum." *Congressional Quarterly Weekly Report* 52, no. 21 (1994).

INTERNET

Carney, Eliza Newlin. "At last, Congress Enters the War Zone." *National Journal* 31, May 1, 1999 [journal on-line]. Available from <http://proquest.umi.com/pqdweb>. Internet. Accessed November 10, 1999.

National Security Council, June 14, 1999 [information on-line]. Available from <http://www.whitehouse.gov/WH/EOP/html/nsc>. Internet. Accessed November 2, 1999.

Stromseth, Jane E. "Understanding Constitutional War Powers Today: Why Methodology Matters." In *The Yale Law Journal* 106, December 1996 [journal on-line]. Available from <http://proquest.umi.com/pqdweb>. Internet. Accessed August 19, 1999.

LEXIS/NEXIS

Burgin, Eileen. *Rethinking the Role of the War Powers Resolution: Congress and the Persian Gulf War* (1995). Available [Online]: LEXUSNEXIS/LAWREV/ALLREV/ (Persian Gulf War and President and Congress and War Power Resolution). [August 02, 1999].

Champlin, Linda and Alan Schwarz. *Political Question Doctrine and Allocation of the Foreign Affairs Powers* (Hofstra Law Review, Winter 1985). Available [Online]: LEXISNEXIS/LAWREV/ALLREV (War Powers and U.S. Constitution). [March 04, 1999].

Fisher, Louis. *Congressional Abdication: War and Spending Powers* (Saint Louis University Law Journal, Summer 1999). Available [Online]: LEXISNEXIS/ LAWREV/ALLREV/ (Congress and the Power of the Purse and War Powers). [November 18, 1999].

Yoo, John. *The Continuation of Politics by Other Means* (California Law Review, March 1996). Available [Online]: LEXISNEXIS/LAWREV/ALLREV (War Powers and U.S. Constitution). [March 04, 1999].

Schiff, Andrew K. *The War Powers Resolution: From the Halls of Congress to the Ills of Bosnia* (The American University Journal of International Law & Policy, 1996). Available [Online]: LEXISNEXIS/ LAWREV/ALLREV/ (War Powers Resolution and Bosnia). [November 10, 1999].

Stromseth, Jane E. *The President, and the Authority to Initiate Hostilities: Collective Force and Constitutional Responsibility* (University of Miami Law Review, October 1995). Available [Online]: LEXISNEXIS/ LAWREV/ALLREV/ (War and Responsibility and Constitutional Lessons of Vietnam and its Aftermath and John Ely). [July 12, 1999].

Terry, James P. *The Criteria for Intervention: An Evaluation of U.S. Military Policy in UN Operations*, 102 (winter, 1996). Available [Online]: LEXUSNEXIS/LAWREV/ALLREV/ (Haiti and US Policy and War Powers and Congress and Uphold Democracy). [August 16, 1999].

Wald, Martin. *The Future of the War Power Resolution* (Stanford Law Review, July 1984). Available [Online]: LEXISNEXIS/ LAWREV/ALLREV/ (U.S. Supreme Court and War Powers and INS v Chadha). [March 05, 1999].

GOVERNMENT DOCUMENTS

U.S. Department of State. *Department of State Bulletin*, No 1871, 72 (May 5, 1975).

Dellum v. Bush, 752 F.Supp. 1141 (D.D.C. 1990).

Subcommittee on National Policy Machinery. *Organizational History of the National Security Council During the Truman and Eisenhower Administrations*. Washington, D.C.: Subcommittee print, 1960.

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